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PEOPLE OF THE STATE OF ILLINOIS
for use of GEORGE MOSHER, MRS.
A. C. MOSHER (also known as
LUCY M. HARLOW), ELLA F. MOSHER,
ALBERT C. SAULT, FRANCIS J. MOSHER
and GEORGE E. MOSHER, Trustees
under the last will and testament
of DIANA R. CHAFFEE, Deceased,

Plaintiffs in Error,

vs.

MYRON W. WHITTEMORE,

Defendant in Error.

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PEOPLE OF THE STATE OF ILLINOIS
for use of BECKIN MOORE, INC.
A. C. MOORE (also known as
LUCKY M. HARLOW), WILLIAM R. MOORE,
ALBERT G. SAULT, FRANKIE J. MOORE
and GEORGE E. MOORE, Trustees
under the last will and testament
of DIANA E. CHATFIELD, deceased.

SHOWN TO
COURT
COURT

Plaintiffs in Error

vs.

MYRON W. WHITTEMORE,

Defendant in Error.

2131.A.645

MR. JUSTICE JUSTICE OF PEACE delivered

the opinion of the court.

Plaintiffs brought suit against the defendant
to recover \$2,000, the penalty of an executor's bond as
by the defendant and another as sureties. The case was
tried before a judge and jury, and at the close of all
evidence there was a directed verdict for the defendant.
Upon which judgment was entered, to reverse which this writ
of error is prosecuted.

The record discloses that in an estate pending
in the Probate Court of Cook County, the defendant and
another were sureties on the executor's bond in the penal
sum of \$2,000; that there were two executors appointed,
one of whom attended to most of the business in settling
the estate; that they were ordered by the Probate Court
to pay to the heirs and legatees some \$4,800. This
not having been done Lewis R. Harlow, the co-executor,
procured the entry of an order by the Probate Court in

which the court found that all of the parties were before it, including the defendant, and that the co-surety Louise E. Harroun had paid to the "heirs at law and devisees" of the deceased the sum of \$2,000, being the face amount of the bond upon which she was one of the sureties; and further found that all claims against the estate of the deceased had been paid, and that by reason of the payment of the \$2,000 Louise E. Harroun had discharged and paid all liability assumed by her upon the bond, and it was ordered and adjudged that she "be and she is hereby discharged, released and absolved from any and all liability whatsoever as surety upon the bond of said executors, and said bond is as to said Louise E. Harroun, but not otherwise, hereby canceled and annulled."

One of the defenses interposed was that the bond had been satisfied by the payment of the \$2,000. This was the view of the trial court, and an instructed verdict was returned accordingly.

The contention of the plaintiffs is that the order of the Probate court above referred to canceled the bond only so far as the surety Louise E. Harroun was concerned, but that it was not canceled as to the defendant's liability; that this order was final and could not be attacked collaterally in the instant case; that if the defendant was dissatisfied with the order of the Probate court in not relieving him from liability on the bond, he should have appealed from the order, and not having done so, he can not now urge that the order was wrong.

which the court found that all of the parties were before it, including the defendant, and that the co-surety Louis E. Harrison had paid to the "belts as law and" "devotion" of the deceased the sum of \$2,000, being the face amount of the bond upon which she was one of the sureties; and further found that all claims against the estate of the deceased had been paid, and that by reason of the payment of the \$2,000 Louis E. Harrison had discharged and paid all liability incurred by her upon the bond, and it was ordered and adjudged that she "be and she is hereby discharged, released and absolved from any and all liability whatsoever as surety upon the bond of said executors, and said bond is as to said Louis E. Harrison, but not otherwise, hereby canceled and annulled."

One of the defenses interposed was that the bond had been satisfied by the payment of the \$2,000. This was the view of the trial court, and an affirmed verdict was returned accordingly.

The contention of the plaintiffs is that the order of the Probate court above referred to cancelled the bond only so far as the surety Louis E. Harrison was concerned, but that it was not annulled as to the defendant's liability; that this order was final and could not be attacked collaterally in the instant case; that if the defendant was dissatisfied with the order of the Probate court in not relieving him from liability on the bond, he should have appealed from the order, and not having done so, he can not now urge that the order was wrong.

We think that this argument is beside the point. The agreement of the sureties when they signed the bond was that in case the executors did not perform their duties faithfully and account fully for the property coming into their hands as executors, they would make good to the parties entitled thereto in a sum not to exceed \$2,000. This has been done; the estate has received all that it was entitled to under the bond, and no further recovery can be had. It would be a novel rule that would permit the recovery of the penalty of the bond from each of the sureties. No authorities have been cited to sustain plaintiff's contention, and we think it selfevident that none can be found. In none of the cases (Parmelee v. Lawrence, 44 Ill. 405; Mueller v. Dobschuetz, 39 Ill. 176; Dupree v. Blake, 143 Ill. 453; Nickerson v. Supples, 174 Ill. App. 136) cited by counsel, did the sureties pay the full amount of their obligation. In the instant case the face of the bond, \$2,000, was so paid by one of the sureties, as shown by the order of the Probate court.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

139 - 24058

MARY E. FENNER,

Appellee,

vs.

ANTON J. CERMAK, Bailiff of
the Municipal Court of Chicago,
and EVERETT W. MAYNARD,

Appellants.

213 I.A. 645

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered
the opinion of the court.

Mary E. Fenner brought an action for the
trial of the right of property against Anton J. Cermak,
Bailiff of the Municipal Court of Chicago, and Everett
W. Maynard. The case was tried before the court without
a jury. There was a finding and judgment in favor of plain-
tiff, to reverse which defendants prosecute this appeal.

The only point made by the defendants is that
the notes secured by the chattel mortgage upon which plain-
tiff's claim was based, did not state upon their face that
they were so secured, and it is contended that this omis-
sion is in violation of section 1 of an act regulating
the assignment of notes secured by chattel mortgages, which
provides, "that all notes secured by chattel mortgages shall
state upon their face that they are so secured * * * and
any chattel mortgage securing notes which do not state
upon their face the fact of such security shall be absolute-
ly void," and therefore plaintiff's chattel mortgage was
void. This is not the law, as it has been repeatedly held

that the act referred to applies only to chattel mortgages, the notes of which have been assigned, and that it does not apply to mortgages like the one in question, where the secured notes are held by the mortgagee. In the instant case the chattel mortgage was not void. Hogan v. Akin, 181 Ill. 448; Sellers v. Thomas, 185 Ill. 384; Smith v. Schey, 101 Ill. App. 223; Central School Supply House v. Hirschy, 106 Ill. App. 258; Schillo v. White, 207 Ill. App. 390.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

that the two witnesses to a crime are not only in a position to identify the
the names of those who have been charged, but also to state if they are
guilty or not. The witnesses to a crime are not only in a position to identify the
persons who have been charged, but also to state if they are guilty or not.
The witnesses to a crime are not only in a position to identify the persons who
have been charged, but also to state if they are guilty or not. The witnesses to
a crime are not only in a position to identify the persons who have been charged,
but also to state if they are guilty or not. The witnesses to a crime are not
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identify the persons who have been charged, but also to state if they are guilty
or not. The witnesses to a crime are not only in a position to identify the
persons who have been charged, but also to state if they are guilty or not.

The following is the testimony of the witnesses to the crime of murder.

Witness 1.

Witness 2.

Witness 3.

Witness 4.

Witness 5.

Witness 6.

Witness 7.

Witness 8.

Witness 9.

Witness 10.

Witness 11.

Witness 12.

Witness 13.

Witness 14.

Witness 15.

Witness 16.

Witness 17.

Witness 18.

Witness 19.

Witness 20.

Witness 21.

Witness 22.

Witness 23.

Witness 24.

Witness 25.

Witness 26.

Witness 27.

Witness 28.

Witness 29.

57 - 23961

SAMUEL E. MOIST, doing business
as the UNION PIANO COMPANY,
Appellant,

vs.

JOSEPH FRIEDMAN and TR. DE BUCK,
Appellees.

213 I.A. 645

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the
court.

The plaintiff, Samuel F. Moist, doing business as the Union Piano Company (appellant) brought suit in the Municipal Court against the defendant, Joseph Friedman, to recover the sum of \$30.00 upon a written assignment of wages alleged to have been given to the plaintiff by one Tr. De Buck, an employee of the defendant, Joseph Friedman, and which assignment of wages purported to have been given to secure monthly payments on a player piano sold and delivered by the plaintiff to De Buck on a conditional sales contract dated December 30, 1916.

On December 30, 1916, De Buck, along with one Joseph DeVogle, went to the store of the Union Piano Company, 335 South Wabash avenue and entered into negotiations for the purchase of a player piano. De Buck paid \$10.00 down on the sale and three papers were drawn up by Messmer, an employee of the plaintiff to be signed by De Buck. The price agreed upon was \$450.00. De Buck paid over \$10.00, signed a note for \$15.00, a conditional sales contract for the balance of the purchase price and an assignment of his wages, which were earned, or to be earned, from his employer, Joseph

2131A.645

UNITED STATES
DISTRICT COURT
SOUTHERD DISTRICT OF NEW YORK

IN SENATE
JANUARY 11, 1916
REPORT
OF THE
COMMISSIONER
OF THE
GENERAL LAND OFFICE
TO THE
SENATE

MR. JUSTICE TAYLOR delivered the opinion of the court.

17 - 1234

The plaintiff, Samuel T. Noist, doing business as the Union Piano Company (appellant) brought suit in the United States District Court against the defendant, Joseph Friedman, to recover the sum of \$30.00 upon a written assignment of wages alleged to have been given to the plaintiff by one T. De Buck, an employee of the defendant, Joseph Friedman, and which assignment of wages purported to have been given to secure monthly payments on a player piano sold and delivered by the plaintiff to De Buck on a conditional sales contract dated December 30, 1915.

On December 30, 1915, De Buck, along with one Joseph Devolic, went to the store of the Union Piano Company, 335 South Wabash Avenue and entered into negotiations for the purchase of a player piano. De Buck paid \$10.00 down on the piano and the balance was to be paid in installments. The price agreed upon was \$450.00. De Buck paid over \$10.00, signed a note for \$15.00, a conditional sales contract for the balance of the purchase price and an assignment of his wages, which were earned, or to be earned, from his employer, Joseph

Friedman, for whom he worked as a janitor. De Buck's evidence is to the effect that he is a Belgian and has only been in this country four years; that he is unable to write the English language; that Messmer told him at the time of the purchase of the player piano that all he had to do was pay the \$10.00 down and that he could pay the \$15.00 after he got the piano; that he put the papers before him and told him to sign; that he said it was all right; that he did not tell him what they were; that he did not tell him what the wage assignment was, although he asked; that he knew the price was \$450.00.

The testimony of the witness De Vogle is to the effect that Messmer told De Buck he only had to pay \$10.00 when he bought the piano; that he could pay the \$15.00 when they brought the piano next Monday; that Messmer then told De Buck to sign certain papers and said, "it is only for the \$15.00 for to pay next Monday"; that Messmer did not ask De Buck anything about the wages; that he, De Vogle, went over with De Buck to do his talking for him but Messmer did not give him any chance; that De Buck did not know what he was signing. On the other hand the evidence of Messmer is to the effect that after the usual talk in regard to the sale of the player piano they went up to the office; that De Buck paid him \$10.00 on the sale; that he then had De Buck sign the note for \$15.00, the conditional sales contract, and a wage assignment; that he told him that the wage assignment guaranteed the payment of the account. The evidence of Messmer is, in part, corroborated by one Newman.

The cause was tried before a jury; a verdict rendered for the defendant and judgment entered; that the plain-

price was \$450.00.
The testimony of the witness De Vogie is to the effect that Messmer told De Buck he only had to pay \$10.00 when he bought the piano; that he could pay the \$15.00 when they brought the piano next Monday; that Messmer then told De Buck to sign certain papers and said, "It is only for the \$15.00 for to pay next Monday"; that Messmer did not ask De Buck anything about the wages; that he, De Vogie, went over with De Buck to do his talking for him but Messmer did not give him any chance; that De Buck did not know what he was signing. On the other hand the evidence of Messmer is to the effect that after the usual talk in regard to the sale of the piano they went up to the office; that De Buck paid him \$10.00 on the sale; that he then had De Buck sign the note for \$15.00, the conditional sales contract, and a wage assignment; that he told him that the wage assignment warranted the payment of the account. The evidence of Messmer is, in part, corroborated by one Newman.

The cause was tried before a jury; a verdict rendered in favor of the defendant and judgment entered that the plaintiff recover the balance of the purchase price of the piano, to wit: \$440.00.

tiff have and recover nothing and that the defendant recover costs.

It is contended on the part of the plaintiff that the evidence does not show that there was fraud in the execution of the wage assignment. No brief has been filed on behalf of the defendant. The record shows that the question at issue resolved itself, chiefly, into a matter of credibility, and in view of the finding of the jury and the evidence as it is presented in the record, we do not feel justified in holding that the verdict of the jury was manifestly against the weight of the evidence. There is no doubt that De Buck knew that he was buying a player piano for \$450.00 and that he paid \$10.00 down on the purchase price. He denies, however, that he knew anything about the assignment of his wages. Also, it is not disputed that he was unable to read or write the English language. If the jury believed that he did not know the contents of the assignment of wages and that he was deceived by the willful action of the defendant, and by that led to execute it, the judgment would have to stand.

Counsel for the plaintiff argue that there can be no fraud unless there is a loss or damage sustained by the party alleging fraud and that one cannot claim to have been defrauded who has been induced by artifice to do that which the law would have compelled him to do. Here, however, there was no obligation on De Buck to give an assignment of wages as that was not necessarily an essential part of the purchase and sale of the player piano. It was a matter of collateral security and if it was obtained by fraud there is no liability. It may be that the plaintiff would have been unwilling to make the sale without the assignment of wages

...that the defendant recover ...
...It is contended on the part of the plaintiff that ...
...the evidence does not show that there was fraud in the ex-
...of the assignment. No price has been filed on ...
...of the defendant. The record shows that the question ...
...was resolved itself, chiefly, into a matter of credibili-
...and in view of the finding of the jury and the evidence ...
...as it is presented in the record, we do not feel justified ...
...in holding that the verdict of the jury was manifestly against ...
...the weight of the evidence. There is no doubt that De Buck ...
...that he was buying a player piano for \$480.00 and that ...
...he paid \$10.00 down on the purchase price. He testified, ...
...that he knew nothing about the assignment of his wages. ...
...it is not claimed that he was unable to read or write ...
...English language. It was held that the assignment was ...
...the terms of the assignment of wages and that he was ...
...to the will of the defendant, and by that ...
...led to execute it, the judgment would have to stand.

...counsel for the plaintiff argues that there can ...
...be no fraud unless there is a loss or damage sustained by ...
...the party alleging fraud and that one cannot claim to have ...
...been defrauded who has been induced by artifice to do that ...
...which the law would have compelled him to do. Here, however ...
...there was no obligation on De Buck to give an assignment of ...
...wages as that was not necessarily an essential part of the ...
...purchase and sale of the player piano. It was a matter of ...
...collateral security and if it was obtained by fraud there ...
...is no liability. It may be that the plaintiff would have been ...
...unwilling to make the sale without the assignment of wages

or that De Buck if he had known would have been unwilling to give the assignment of wages. We do not think, however, that that is material or of any legal importance. The verdict of the jury means that the assignment of wages was obtained by fraud and we are of the opinion that the evidence sufficiently supports that finding, and from that it follows the judgment must stand.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

or that the Book it has been known have been unwilling to
 give the assignment of wages. We do not think, however, that
 that is material or of any legal importance. The matter of
 the fact is that the assignment is valid and enforceable
 from the fact of the assignment and the fact that the
 assignor has received the full value of the assignment
 and that the assignee has received the full value of the
 assignment.

Nothing is to be done in the matter, the assignment is

valid.

There is no more

to be done

in the matter

of the assignment

and the fact

that

the assignment is valid and enforceable

from the fact of the assignment

and the fact that the

assignor has received the full value of the assignment

and that the assignee has received the full value of the assignment.

110 - 24028

CITY OF CHICAGO,

Appellee.

vs.

F. J. BURNS,

Appellant.

213 I.A. 645

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On November 13th, 1917, a complaint was filed against F. J. Burns, the appellant, charging that on the 12th day of November 1917, in the City of Chicago, he kept, managed, maintained and owned "a common gaming house then and there being located at 818 East 39th street in the City of Chicago, the said common gaming house then and there being kept for the purpose of permitting persons to come together for the purpose of gaming for money or other valuable things in violation of Section 977 of the Chicago Code of 1911." The defendant pleaded not guilty; introduced no evidence, and was fined \$50.00 and costs.

The only witnesses called were two police officers who testified on behalf of the people. Their evidence is to the effect that appellant was arrested at "811 East Thirty-ninth Street"; that it was a flat used as a private residence; that gambling was going on; that certain racing sheets were present there, being written on by one Max; that a racing sheet, which contained the names of the horses they were betting on, was tacked on the door, inside; that there were

2131.A. 245

On November 18th, 1917, a complaint was filed

against E. J. Burns, the respondent, charging that on the

21st day of November 1917, on the date of marriage, he

intentionally and unlawfully took away from

the said Burns, his wife, and with her

and with her, and with her, and with her,

and with her, and with her, and with her,

and with her, and with her, and with her,

and with her, and with her, and with her,

and with her, and with her, and with her,

and with her, and with her, and with her,

The only witnesses called were two police officers

who testified on behalf of the people. Their evidence is to

the effect that appellant was arrested at "Old Man's

"King's Bar"; that it was a first case as a private residence;

that gambling was going on; that certain racing horses were

present there, being written on by one man; that a racing

sheet, which contained the names of the horses, was

present on, was locked on the door, and that there were

19 men there in all; that appellant after he was arrested said, "you have got everything, you have got those sheets;" that one of the men present said that he made a bet with appellant and that the latter took the money and turned it over to one Max.

It is assigned as error; (1) that where the complainant states the street number of an alleged gaming house the proof must sustain that allegation; (2) that although the time of the commission of the alleged offense need not be proved exactly as laid yet some time must be proven; (3) that there was insufficient proof that defendant was the keeper of a gaming house.

(1) The locus in quo described in the complaint is "313 East 39th Street" whereas the only evidence introduced is to the effect that appellant was found conducting a gaming house and arrested at "311 East Thirty-ninth Street." This court has decided in a number of cases that (a) the averment of place is a material one and (b) that it must be proven. City of Chicago v. Ledwell, 207 Ill. App. 69. The People v. Lewis, 140 Ill. App. 493.

(2) No proof was offered as to when the alleged offense was committed. Neither of the witnesses called makes any reference to any time when it is claimed the appellant violated the ordinance. That defect is fatal. ~~XXXXXXXXXX~~
~~XXXXXXXXXXXXXXXXXXXX~~ City of Chicago v. Enright, 27 Ill. App. 559.

(3) Although the evidence of the police officers (a) as to what was taking place when they arrested appellant, (b) as to the racing sheets and papers which they obtained,

(c) as to the statement of the yard master which was testified to, that "he made a bet with Burns and that Burns took the money and turned it over to Max", all taken together seem sufficiently to prove the material allegations of the complaint, it is not necessary for us to pass definitely on the merits; and in view of the errors already mentioned pertaining to the failure to prove either the time or place, we are of the opinion that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

142 - 24061

FORD & PARKER TEAMING COMPANY,
a corporation,

Appellee,

vs.

THE TRACTOR TRANSPORT COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

213 I.A. 646

MR. JUSTICE TAYLOR delivered the opinion
of the court.

This is an appeal from a judgment in favor
of the plaintiff (appellee) and against the defend-
ant (appellant) in the sum of \$476.00 for damages as
a result of a collision between a truck belonging to
the plaintiff and one belonging to the defendant.

The collision occurred on February 15, 1917,
on team track number 4 - running east and west - which
is located a little north of Randolph street and is
connected with the Illinois Central Railroad yards.
One Milalla, an employee of the plaintiff, was driving
a loaded truck west on the team track and as he got to
the driver's subway one Harr, who was acting as a
chauffeur for the defendant and also was driving a
truck, but which was empty, came into the team track
around the southeast corner of Randolph street and
the team track, and, as a result, the two trucks collided
and that of the plaintiff was damaged.

The evidence of Milalla, who drove the plain-

2131.A.646

of the court. This is an appeal from a judgment in favor of the plaintiff (appellee) and against the defendant (appellant). The plaintiff is the Illinois Central Railroad Company and the defendant is the Illinois Central Railroad Company. The collision occurred on February 18, 1917, at the intersection of the Illinois Central Railroad tracks and the tracks of the Illinois Central Railroad Company. The collision was caused by the negligence of the defendant. The plaintiff is entitled to damages for the loss of its property and for the expenses incurred in the litigation. The court has granted the plaintiff's motion for summary judgment and has awarded damages to the plaintiff. The defendant has appealed the judgment and the court has granted the appeal. The court has affirmed the judgment of the lower court and has awarded damages to the plaintiff. The court has also awarded costs to the plaintiff. The court has granted the plaintiff's motion for summary judgment and has awarded damages to the plaintiff. The defendant has appealed the judgment and the court has granted the appeal. The court has affirmed the judgment of the lower court and has awarded damages to the plaintiff. The court has also awarded costs to the plaintiff.

tiff's truck is that the team track was only about 21 or 22 feet wide; that he was driving on the right side and was in second speed going about 6 miles an hour; that he was only about 4 feet away from the railroad track at his right; that he first saw the other truck when it came around the corner of Randolph street from the south to turn in on the team track; that he could not see it until it made the turn; that it was coming at about 18 to 20 miles an hour; that when it started to make the turn it started to go over on the right hand side; that he, in trying to save himself an avoid an accident, swung his truck to the left; that when the truck of the defendant made the turn it was about 25 or 30 feet away from him; that the driveway is level; that the truck he was driving, after it was struck, slid about 6 or 7 feet south; that he had a seven ton load on his truck at the time of the collision; that the driver of the defendant's truck was drunk. The evidence of one Rix, who was on the plaintiff's truck at the time of the collision, is to the effect that they were going about 7 miles an hour and that the other driver was "coming pretty fast" about 19 or 20 miles an hour; that when the driver of the plaintiff's truck saw the other truck coming he swung his truck to the left and south and when the collision took place the plaintiff's truck was near the south railroad track; that the defendant's truck hit the right front wheel of the plaintiff's truck and pushed the plaintiff's truck back about five feet. The evidence of the secretary and treasurer of the plaintiff's company is to the effect that two days after the accident the driver of the defendant's truck said over the telephone, "he was sorry that he was drunk."

The evidence of one witness, who was in the vicinity of the truck at the time of the collision, is to the effect that the truck was going about 7 miles an hour and that the other driver was "coming pretty fast" about 15 or 20 miles an hour; that when the driver of the plaintiff's truck saw the other truck coming he swung his truck to the left and south and when the collision took place the plaintiff's truck was near the south railroad track; that the defendant's truck hit the right front wheel of the plaintiff's truck and pushed the plaintiff's truck back about five feet. The evidence of the secretary and treasurer of the plaintiff is to the effect that two days after the accident the driver of the defendant's truck was interviewed and that he was told that he was guilty.

The witness Hermensha, who was at the time of the accident, a helper on the plaintiff's truck, testified that when the accident took place the two trucks were in the center of the road and that the driver of the defendant's truck was drunk.

The defendant called two witnesses, McFarland, manager for the defendant, and Harr, the driver of its truck. The former testified that he went to the place of the collision immediately after it took place and that about ten minutes afterwards he saw Harr and that he was sober. The evidence of Harr, the driver for the defendant, is to the effect that he had been a chauffeur for eight years and that at the time in question he was driving east on track four of the Illinois Central team tracks and the other driver was coming west; that the latter when within about 30 or 40 feet in front of him cut directly across the track in front of defendant's truck and that the collision then took place; that he, himself, was driving about twelve miles an hour and that the plaintiff's driver was going at about the same rate; that when he turned in on the team track he was on the south, the right hand side; that when he first saw the defendant's truck it was on the north side of the drive; that the defendant's driver gave no warning that he was going to turn; that he, himself, tried to stop; that the truck he was driving weighed seven and a half tons; that on the day in question he may have had a drink "but as far as he knows he was sober."

The cause was tried without a jury and at the close of the plaintiff's evidence, also at the close of all the evidence, the defendant moved the court to find for the

The witness testified that he was at the time of the accident, a helper on the plaintiff's truck, that he saw the defendant's truck when the two trucks were in the center of the road and that the driver of the defendant's truck was drunk.

The defendant called two witnesses, Raymond, who was for the defendant, and Hart, the driver of the truck. The former testified that he was at the place of the collision immediately after it took place and that about ten minutes afterwards he saw Hart and that he was there. The witness of Hart, the driver for the defendant, is to the effect that he had seen a plaintiff's truck years and that at the time in question he was driving past the truck four of the Illinois Central team tracks and the other driver was coming west; that the latter was about 20 or 25 feet in front of him and directly across the track in front of defendant's truck and that the collision then took place; that he, himself, was driving about twenty miles an hour and that the plaintiff's driver was going at about the same rate; that when he turned in on the team track he was on the north, the right hand side; that when he first saw the defendant's truck it was on the north side of the driver; that the defendant's driver gave no warning that he was going to turn; that he, himself, tried to stop; that the truck he was driving weighed seven and a half tons; that on the day in question he was hauling a brick "but as far as he knows he was sober."

The case was tried without a jury and at the close of the plaintiff's evidence, also at the close of all the evidence, the defendant moved the court to find for the

defendant. Both motions were overruled and judgment was entered in favor of the plaintiff and against the defendant in the sum of \$476. It is claimed by the defendant that the judgment is clearly against the weight of the evidence. With that contention, however, we cannot agree. The evidence on the part of the plaintiff tends to show that the driver for the defendant drove east, around the southeast corner of Randolph and into the team track, at a high rate of speed, and as he turned, went over on the north side of the team track in front of the truck driven by the driver of the plaintiff, and that the latter, undertaking under the circumstances to avoid a collision, turned his truck towards the southwest, but was unable to escape, and the collision of the two trucks took place. It is true that the driver of the defendant's truck claims that he was driving east on the right side of the team track and that the driver of the plaintiff's truck deliberately cut across to the south in front of him and that as a result the collision took place.

There is, however, nothing of importance in the record in corroboration of the testimony of the driver for the defendant; while on the other hand there is ample evidence, which the trial judge rightly may have believed, that at the time of the accident the driver of the defendant's truck turned the corner and went over on the north side of the team track and by doing so precipitated the collision. If the trial judge believed the driver of the plaintiff's truck and his two helpers, who were with him at the time, it in-

Defendant. Both parties were surprised and surprised
was entered in favor of the plaintiff and against the
defendant in the sum of \$400. It is claimed by the
defendant that the judgment is clearly against the
weight of the evidence. With that contention, however,
we cannot agree. The evidence on the part of the plain-
tiff tends to show that the driver of the defendant's
truck was, around the defendant's corner of Main
and from the town track, at a high rate of speed, and
as he approached, went over on the north side of the town
track in front of the truck driven by the driver of
the plaintiff, and that the latter, notwithstanding
the circumstances to avoid a collision, turned his truck
toward the defendant, but was unable to do so, and the
collision of the two trucks took place. It is true
that the driver of the defendant's truck claims that he
was driving east on the right side of the town track
and that the driver of the plaintiff's truck deliberately
cut across to the north in front of him and that as a
result the collision took place.

There is, however, nothing of significance in
the record in corroboration of the testimony of the
driver for the defendant; while on the other hand there
is ample evidence, which the trial judge rightly may
have believed, that at the time of the accident the
driver of the defendant's truck turned the corner and
went over on the north side of the town track and by
doing so precipitated the collision. If the trial
judge believed the driver of the plaintiff's truck and
the two witnesses, who were with him at the time, to be

evitably follows that he was bound to render judgment for the plaintiff.

It is contended by the defendant that the court erred in admitting the testimony of Parker, which was to the effect that two days after the collision the driver of the defendant's truck told him over the telephone that "he was sorry that he was drunk" at the time of the collision.

The testimony of Harr, the driver of the defendant's truck, was that he may have had a drink but as far as he knew he was sober. The cases cited by counsel for the defendant do not seem to be applicable. In Penn Co. v. Bridge Co., 170 Ill. 645, the court held that a statement by a clerk of the defendant made two or three weeks after the particular occurrence, that a certain car was not inspected before it went out because the inspector was drunk, was not competent. The court said: "It is a well established rule that the declaration of an agent or servant can only be admitted in evidence if at the time of making the declaration he is doing something about the business of his principal." That undoubtedly is the general rule, but that rule is not applicable to the facts in this case. Here, the witness merely made a statement concerning his own physical or nervous condition at the time of the collision; that of itself was no evidence whatever of the objective physical facts existing at the time of the collision and bearing on the subject of proximate cause. Further, as it was tried before the court without a jury, it is now immaterial. The judgment will be affirmed.

AFFIRMED.

1947 (roughly) through 1951 (more or less), several political parties

It is important to the Government that the

The testimony of Mr. [redacted] the driver of the [redacted]
[redacted]'s truck, was that he may have had a drink but no
[redacted] as he knew he was sober. The same elixir by [redacted]
Now the defendant do not seem to be applicable. It seems
U.S. District No. 170 N.Y. City, the court held that a
statement by a clerk of the defendant made two or three
weeks after the particular occurrence, that a certain

and was not suggested before it went out because the
language was blank, was not competent. The court said:
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the time of making the declaration he is doing something
about the business of his principal." That undoubtedly
is the general rule, but that rule is not applicable to
the facts in this case. Here, the witness merely made
a statement concerning his own physical condition
at the time of the collision; that of itself was
no evidence whatever of the objective physical facts exist-
ing at the time of the collision and bearing on the subject
of negligence. Further, as it was ruled before the
court without a jury, it is now immaterial. The judgment
will be affirmed.

162 - 24082

MAE E. GRABORSKI,

Appellee,

vs.

CHICAGO AUTO SALES COMPANY,
a Corporation,

Appellant.

213 I.A. 646

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion
of the court.

The plaintiff, Mae Graborski, having become dissatisfied with an automobile which she had purchased from the defendant, Chicago Auto Sales Company, and having left it with the latter to be sold, as she claimed, not below a certain minimum price, brought suit against the defendant for damages for a breach of contract and recovered a judgment in the sum of \$155.12 and costs.

On April 15, 1917, plaintiff gave a check of \$100.00 in part payment on a new Buick automobile purchased from the defendant, and on May 4, 1917, an additional check in the sum of \$265.00. For the balance of the purchase price, \$305.76, promissory notes and a chattel mortgage were given. Subsequent to May 4, 1917, the plaintiff paid \$31.03 in liquidation of one of the promissory notes. The total amount paid by the plaintiff on the purchase price - \$1065.00 - of the automobile was \$446.03. Between May 4, 1917, and June 11, 1917,

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On April 15, 1917, Plaintiff gave a check at \$100.00 in full payment on a new Buick automobile purchased from the defendant, and on May 4, 1917, an additional amount of \$100.00 was paid by the plaintiff at the purchase price, \$200.00, twenty-two notes and a chattel mortgage were given. Subsequent to May 4, 1917, the plaintiff paid \$21.00 in liquidation of one of the promissory notes. The total amount paid by the plaintiff on the purchase price - \$221.00 - of the automobile was \$421.00. Between May 4, 1917, and June 11, 1917,

the automobile was taken from time to time to the place of business of the defendant for repairs. On June 11, 1917, the plaintiff had a conversation with one Krinsky concerning the re-sale of the automobile; as to what was said the evidence is conflicting.

The evidence of the plaintiff is to the effect that Krinsky said he would sell the car for her so that she would lose only \$50.00, and that she accepted that proposition and that subsequently on June 14, 1917, in a conversation over the telephone Krinsky told her that he had a customer who would pay \$950.00 for the automobile and that she told him she would not sell at that figure.

The evidence of Krinsky, the president of the defendant company, is to the effect that he, himself, drove the automobile from the factory at Flint, Michigan, to Chicago, and that it was a first class new Buick automobile when it was sold; that shortly after the plaintiff bought it it was brought in for repairs; that the two rear fenders and the tank were dented and that the front wheel and the axle were bent; that the repairs were made and that it was then brought in on several later occasions; that on one occasion the plaintiff stated that if he could get her anything over \$800.00 for it she would sell; that he told her the defendant would take the automobile and sell it for her and charge her 10% commission; that accordingly it was subsequently sold by the defendant for \$950.00 and that amount tendered to her.

The evidence of the witness Powers, who acted as salesman and sold the car to the plaintiff for the

The testimony was taken from him on the day of business of the defendant for repairs. On June 11, 1917, the defendant was a registered agent for the defendant in the State of Illinois and he was not a resident of the State of Illinois.

The defendant at the time of the trial was in the State of Illinois and he was not a resident of the State of Illinois. The defendant was a registered agent for the defendant in the State of Illinois and he was not a resident of the State of Illinois. The defendant was a registered agent for the defendant in the State of Illinois and he was not a resident of the State of Illinois.

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The defendant at the time of the trial was in the State of Illinois and he was not a resident of the State of Illinois. The defendant was a registered agent for the defendant in the State of Illinois and he was not a resident of the State of Illinois.

the defendant, is to the effect that it was a brand new Buick; that he saw the automobile at different times when the plaintiff brought it back; that it was never driven properly; that there was too much oil in the crank case; that it gummed the spark plugs and caused the valves to stick; that he saw it on one occasion when the fender and the tank were both injured; that the car was scratched quite a lot; that he talked with the plaintiff a number of times about selling it for her; that she said she would like to turn it in and asked a number of times what she could get for it; that at one time she wanted to sell the car for \$300.00; that he told her that their commission was usually 10% for selling an automobile.

The evidence of the witness Speckt is to the effect that the gasoline tank was injured, but not by any one of the employees of the defendant; that it took place outside of the building. Likewise, the testimony of Gebhard, who was the manager of the service department, is to the effect that when the plaintiff brought the automobile in the gasoline tank was dented in the back. On the other hand, the testimony of the plaintiff is to the effect that the only injury was to the rear tank which was dented in a quarter of an inch and that that was done while it was in the possession of the defendant.

The cause was tried without a jury and judgment in the sum of \$155.00 entered against the defendant and in favor of the plaintiff.

The sole question that arises on the face of the record is, what was the oral contract, if any, made

between the plaintiff and the defendant on June 11, 1917, or about that time, for the re-sale of the automobile? The evidence shows that between May 4, 1917, when the automobile was originally bought, and June 11, 1917, it had been turned in a number of times to be repaired, and on one occasion it had been in a collision which had resulted in some damage, the amount being in dispute.

From the evidence of Krinsky and Powers it would appear that the plaintiff became anxious to sell the automobile and was willing to sell it for less than what it cost. However, as to the evidence that pertains to the oral contract, we are limited - as no one else testified on that subject - to the testimony of the plaintiff for herself and Krinsky for the defendant, and their testimony is altogether conflicting. She claimed that in her conversation with the defendant the maximum amount of her loss was to be fixed at \$50.00, and that in the conversation over the telephone on June 14, 1917, when Krinsky told her he had a customer who would pay \$950.00, she told him not to sell at that figure. On the other hand, he testified that she authorized the defendant to sell it for anything over \$300.00. Before the trial judge, therefore, it became a matter of credibility and evidently he did not give credit to the story told by Krinsky on behalf of the defendant, but considered the evidence of the plaintiff as truthful and sufficient to base a judgment upon. Coming here, as it does now, under these circumstances,

From the evidence at Kalamy and Powers it
well appears that the plaintiff became anxious to sell
the automobile and was willing to sell it for less than
that it cost. However, as to the evidence that pertains
to the oral contract, we are divided - as at one time
testified on that subject - to the testimony of the
plaintiff for Powers and Kalamy for the defendant,
and their testimony is altogether conflicting. The
evidence that in her conversation with the defendant
the maximum amount of her loss was to be fixed at \$250.00,
and that in her conversation with the defendant on June
12, 1917, when Kalamy told her he had a customer who
would pay \$250.00, who told him not to sell at that
figure. On the other hand, he testified that she
authorized the defendant to sell it for anything up to
\$250.00. Before the trial judge, therefore, it became
a matter of credibility and evidently he did not give
weight to the story told by Kalamy on behalf of the
defendant, but followed the evidence of the plaintiff
as truthful and sufficient to bear a judgment upon.
Conceding here, as it does now, under these circumstances,

-5-

we are unable to find that the judgment is manifestly against the weight of the evidence.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

[illegible]

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91 - 24005

THE CITY OF CHICAGO,

Defendant in Error,

vs.

JOHN W. STAMOS,

Plaintiff in Error.

213 I.A. 646

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a quasi-criminal action brought by the City of Chicago against the defendant, Stamos, to recover a penalty for an alleged violation of Sec. 2019, of the Revised Municipal Code of Chicago. There was a trial before a court without a jury and the court, after hearing the evidence, found the defendant guilty of a violation of said ordinance and assessed a fine against the defendant in the sum of \$50.00. Judgment was entered accordingly, to reverse which, the defendant has sued out this writ of error.

In contending that the judgment should be reversed, the defendant urges, among other things, that the evidence failed to show any violation of the ordinance as alleged in the complaint. The ordinance in question reads as follows:

"2019. Every common, ill-governed or disorderly house, room or other premises, kept for the encouragement of idleness, gaming, drinking, fornication or other misbehavior, is hereby declared to be a public nuisance, and the keeper and all persons connected with the maintenance thereof, and all persons patroniz-

240 .A.1818

"SIC. Every woman, all-overman or disoverly
house, room or other premises, kept for the encourage-
ment of license, gaming, drinking, tobacco use or
other misbehavior, is hereby declared to be a public
nuisance, and the keeper and all persons connected
with the maintenance thereof, and all persons participat-

ing or frequenting the same shall be fined not exceeding \$200.00 for each offense."

The complaint charges that the defendant, on the 12th day of February, A. D. 1917, was connected with the maintenance of such a place as the ordinance described.

The evidence submitted by the city was given by several police officers and was to the effect that - about 1:45 A.M. on January 29th, 1917, they had followed a man and a woman to the Washington Hotel, which was located in South Chicago, and of which the defendant was the proprietor. They gave further testimony, tending to show that this couple had gone to the hotel for the purpose of fornication. They also testified that about 3:30 A.M. on February 8th, 1917, they had followed another couple to this hotel, and they testified to facts which tended to indicate that this couple had also gone to the hotel for the same purpose. They testified to having had conversations with the clerk on each occasion in which the clerk had denied any knowledge of the couples referred to, being in the hotel; but that the officers on both occasions proceeded to the rooms they were occupying, and found them.

The only testimony in the record, given by the plaintiff's witnesses, having to do with the date alleged in the complaint, namely, February 12th, 1917, is to the effect that about 1:30 A.M. on that day they had followed to the hotel, the same couple that they referred to in their testimony in connection with the occurrence of February 8th, and when they followed the couple up the stairs to the hotel office, they heard them ask the clerk for a room, and that they then heard the clerk say he would not rent a room to

and it is suggested that the same shall be done in the future.

The defendant's statement is that on the 12th day of January, A. D. 1917, was connected with the defendant at that place as the defendant's statement.

The defendant's statement is that on the 12th day of January, A. D. 1917, was connected with the defendant at that place as the defendant's statement.

At 1:30 A.M. on January 12th, 1917, they had followed a man and a woman to the Washington Hotel, which was located in Chicago, and of which the defendant was the proprietor. They gave further testimony, stating to show that they were in the hotel on the 12th day of January, 1917, after which they stated that they were in the hotel on the 12th day of January, 1917, and that they were in the hotel on the 12th day of January, 1917.

Testimony to show that they were in the hotel on the 12th day of January, 1917, and that they were in the hotel on the 12th day of January, 1917.

They testified to having had conversations with the man on each occasion in which the man had denied any knowledge of the couple, except to, being in the hotel; but that the defendant on both occasions proceeded to the room they were occupying, and there was.

The only testimony in the record, given by the defendant's witnesses, having to do with the date alleged as the defendant, namely, February 12th, 1917, is to the effect that about 1:30 A.M. on that day they had followed to the hotel, the same couple that they referred to in their testimony in connection with the occurrence of February 28th, and when they followed the couple to the room in the hotel, they found them on the floor of a room, and that they then knew the couple and would not grant a man to

them. The chief witness for the plaintiff stated that the clerk refused the couple a room on the 12th, when he saw the officers. Although the night clerk in his testimony gives some other explanation and reason for refusing to give the couple a room on the 12th, he does not directly deny the testimony of the officers to the effect that his refusal was occasioned by the fact that he saw them coming. We have carefully examined the evidence and we are not able to say that the trial court erred in holding that it was sufficient to establish the commission of the offense charged on the date alleged, namely, February 12th. In view of the conflicting testimony as to the reason for refusing the couple a room on the 12th, we are of the opinion that the evidence as to the prior occurrences, was admissible. In any event the evidence as to these occurrences was given without any objection on the part of the defendant. Although an analysis of such an action as this would seem to lead to the conclusion that it was criminal in its nature, being occasioned by an alleged violation of an ordinance that was passed for the good order of society, and the fine which it seeks to impose being apparently intended by the law making body as a punishment of the past offense and a deterrent of future offenses of the same kind, still our courts have held that it is a civil action and that being the case, in order to find as he did, the trial judge had only to believe the charge established by a preponderance of the evidence.

Town of Havana v. Biggs, 58 Ill. 483.

The defendant has also urged that the complaint was bad, in charging the defendant with being an "inmate" and also that the allegation of the complaint is too uncertain

to sustain a conviction, since it alleges two distinct offenses, namely, that of being an "inmate" and that of being "connected with the maintenance" of a disorderly house. The allegation charging defendant with being an "inmate" of the house may be considered as surplusage and entirely disregarded. This would leave the complainant as charging only the one offense covered by the ordinance, namely, that of being "connected with the maintenance" of a disorderly house. Further, the defendant is not in a position to urge this point because he must be considered to have waived it in going to trial without making a motion for a more specific complaint.

The plaintiff's witnesses consisted of three police officers, the first of which testified fully as to the alleged facts; the other two merely stating that their testimony would be the same as that of the first witness. This practice is bad, as the defendant contends, but he is in no position to take any advantage of this now inasmuch as he made no objection to that form of the testimony of these two witnesses, in chief and proceeded to cross-examine them.

Although the record fails to show that the venue was proven by any direct question as to whether the facts in question happened within the City of Chicago, there is sufficient testimony in the record to make out the venue. The testimony of the defendant is to the effect that he is the proprietor of the Washington Hotel, which is located in South Chicago, and in examining the night clerk, called as a witness for the defense, counsel for the defendant asked him how long he had been in the City of Chicago, and he answered, "Seven months". The next questions and answers were as follows:

Q.- Seven months in South Chicago?

A.- Yes sir.

Q.- During that period of seven months, where have you been employed?

A.- The Washington Hotel.

Q.- As night-clerk?

A.- Yes sir.

The occurrences in question were shown to have occurred at this hotel and we believe the venue to have been sufficiently established.

For the reasons stated, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

WASHINGTON, D. C.

OFFICE OF THE ASSISTANT SECRETARY

FOR LAND MANAGEMENT

ALBUQUERQUE

NEW MEXICO

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT

FROM THE ASSISTANT SECRETARY

RE: [Illegible text]

[Illegible text]

[Illegible text]

[Illegible text]

[Illegible text]

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[Illegible text]

99 - 24015

D. M. CRANE, JOHN MCKEAN,
EDWIN J. EVANS and A. E.
PETERS, doing business as A. E.
PETERS & CO.,

Plaintiffs in Error,

vs.

MAX L. TEICH and CARL C. ROESSLER,

Defendants in Error.

213 I.A. 646

Error to

~~APPEAL FROM~~

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal from a decree entered by the trial court in a suit in equity whereby the plaintiffs in error, hereinafter referred to as the complainants, sought to foreclose their respective mechanic liens on the premises of the defendants in error, hereinafter referred to as the defendants. By that decree the court found that the complainant McKean had established his lien to the extent of \$28.00, and the decree contained appropriate provisions accordingly. As to the other complainants, the decree found the equities with the defendants and dismissed the bill.

The defendants leased the premises in question to one, Perry, for a period of several years for use by him as a lunch club or cafeteria. The lease provided that Perry was to furnish "all fixtures, * * * light, pipe and wire connections, and do all decorating and repairing and make all improvements in said premises, at his own expense * * * except the said lessors agree that they will install a steam supply pipe and two water supply pipes, to the wall or en-

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other counsel made, the house found the evidence with the
other counsel appropriate provisions accordingly. As to the
and continued as long as the extent of the bill, and the
in this regard the court found the provisions of the
therein is correct, established evidence in the case.
from their respective members. I am on the subject of the
was referred to in the committee, in that of the
and as a result is today known the principle of the

trance of said premises."

The evidence showed that the complainant McKean, built a wall of white enameled brick which constituted the front of a steam table for keeping various foods warm. This so-called wall was three or four feet in height, built up in mortar on the floor, and at one end joined the wall of the room in which it was located. He also cut an opening through a wall for the purpose of furnishing a doorway, and bricked up an old fire-place, and made some small repairs to the plastering. The trial court allowed the items involving the cutting of the doorway and the closing up of the fireplace, and disallowed the others.

The evidence further showed that the complainant Crane, did certain plumbing, gas-fitting and steam-fitting work, such as connecting the steam table with the steam supply and steam return, and connecting the gas range with the gas supply, and an ice-box with a waste, and a dish-washer with certain supply and waste pipes, and also a sink. As to the complainant Evans, it was shown that he adjusted some doors and windows and built some shelving, and also a garbage box, which was located in an areaway and fastened to the outside of the building, and also cut through a counter and put a door in it. McKean's entire claim amounted to \$103.00, on which he had received a payment of \$50.00; the claim of the complainant Crane, amounted to \$210.00, and that of the complainant Evans, to \$37.83.

The only question presented on this appeal relates to whether or not the items involved are such as are included within the terms of our statute on Mechanics' Liens. It seems clear

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The evidence further shows that the defendant's conduct was such as to constitute a crime under the laws of the State of New York.

that the two items for which the trial court allowed a lien, namely, the cutting of the doorway and the closing up of the old fireplace, were within the statute and the action of the court with respect to them was correct. We are of the opinion that the trial court was also correct in his ruling as to the balance of the items. With the exception of a few of the items involved in the claim of the complainant Evans, we are of the opinion that the material and work in question constituted mere trade fixtures, which were not the proper subject of a lien as against the building. Such fixtures are not brought within the statute merely by showing that they are attached in some way to the building, but to make them the proper subject of a lien, it must appear that they have been so installed as to become a part of the real estate. The so-called brick wall and steam table and its connections, and the other piping and items which have been referred to, were removable trade fixtures and not permanent fixtures or improvements to the building. The intention with which such things are installed is important in determining whether they become a part of the realty. As installed, the fixtures involved, form no part of the building, - they were installed for the particular business which was to be conducted by Perry, the tenant, and from the evidence it seems clear that they were not intended by the parties to be a permanent part of the building. Their removal from the premises could be made without any damage to the realty and the defendants would have been unable to prevent their removal, either by the tenant or an execution by his creditors. Haas Electric Co. v. Amusement Co., 236 Ill. 452; Baker v. McClurg, 193 Ill. 28; Merle v. Beifeld, 194 Ill. App. 364, 380-381; Moore v. Smith,

24 Ill. 513, 517; Boward v. Low, 122 Ill. 487; McAlear v. New York Life Ins. and Trust Co., 177 Ill. App. 339. The case last cited is in point although it did not there appear that the landlord had authorized any improvement, while in the case at bar the lease gave the tenant the right and further required him to make such repairs and improvements as required for his business. Such authority as contained in this lease in no way interferes with the right of the tenant to remove these fixtures, at the end of the term, if he so desires. The evidence here shows that after this work had been done, and the tenant had failed in business, and the lease terminated, practically all the fixtures involved were taken out. The testimony is that the man who furnished the steam table and range, took them away after disconnecting them from the pipes to which they were attached, and that certain of the shelving and cases and brackets were removed by a bailiff of one of the courts. As this court pointed out in Fehr Construction Co. v. Postal System of Health Building, 189 Ill. App. 519, there can be a Mechanic's Lien only for such work as constitutes a permanent improvement to the building or for articles furnished which may be considered as permanent fixtures. In that case the court declined to allow liens for certain racks and shelves electric cabinets, curtains and hooks and labor necessary for their installation, while a lien was allowed for marble and work furnished in connection with the installation of a shower bath. The latter was held to constitute a permanent fixture rather than a trade fixture, where the lease provided that no alterations or additions were to be made except with the consent of the lessor, and such consent was given for the installation of the shower bath, and where the lease further provided that all alterations and additions, should remain, at the end of the term, for the benefit of the lessor.

If the lease involved in the case at bar had contained the latter provision, a different question might be presented. In such event it might well be contended that there was evidence of an intention on the part of the parties, that these fixtures were to become a part of the realty. Of course the presence of such provisions in a lease are not necessarily controlling.

We believe it would serve no useful purpose to discuss the cases to which our attention has been called by the complainants. We do not consider them in point. Certain of them, such as those involving alterations, changing the premises so as to make them suitable only for theatre purposes, would be in point if the work done, and material furnished here, had been of that character; but it was not. After this tenant had vacated and the trade fixtures involved had been removed, the premises could not be said to be suitable only for restaurant purposes, but they were suitable for any general purpose.

There are a few items in the claim of the complainant Evans, for which he may have been entitled to a lien, but there is not sufficient evidence in the record to determine the question definitely and further it is impossible to say from the testimony in the record, what the value of these items were, even if it could be determined that they might be held to be proper subject of a lien under the statute.

Finding no error in the record, the decree of the Circuit Court will be affirmed.

AFFIRMED.

J. Taylor, Jr. Accounting

140 - 24059

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error.

vs.

JOHN REND,

Plaintiff in Error.

213 I.A. 647

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant seeks to reverse a judgment entered in the Municipal Court of Chicago, in a case in which he was charged with pandering, by which judgment he was sentenced to serve a year in the House of Correction and pay a fine of \$500.00 and costs.

The information which was filed in this case charges that the defendant "heretofore, to-wit: on (the) or about 15th day of December, A. D. 1917, at the City of Chicago, aforesaid, did then and there and on divers other days and times as well before and after that date did cause induce persuade or encourage one Johannah Von Lukowitz to become an inmate of a house of prostitution and did knowingly and without lawful consideration take accept or receive money or other things of value from the said Johannah Von Lukowitz the earnings of her prostitution and did directly take receive or accept money or other valuable things for providing, procuring or furnishing for another person for the purpose of illicit sexual intercourse," etc.

THE AIR

The defendant's contention that the information is bad for duplicity cannot be made for the first time in this court, as it is a mere defect of form which is cured by verdict or by a finding of guilty by the court. Joyce on Indictments, Sec. 392, People v. Greenberg, 172 Ill. App. 360. No motion to quash was made in this case. There was a motion in arrest of judgment, but that was not sufficient to raise or preserve the question of duplicity. 2 Enc. Pl. & Pr. 802, 22 Cyc. 437.

The evidence submitted by the prosecution, on which the defendant was convicted, went to the second charge made in the information. If that second clause was sufficient and charged a legal crime and the evidence can be said to have established its truth, beyond a reasonable doubt, any defects there may have been in the first and third paragraphs, cannot bring about a reversal of the judgment. (22 Cyc. 438) and it will not therefore be necessary to pass upon such objections as are made to those paragraphs particularly.

Defendant contends that the information is bad in that it nowhere alleges that the said Johannah Von Lukowitz was a female person but on the contrary the information begins with the recital "Johannah Von Lukowitz, a resident of the City of Chicago in his own proper person comes now here into court," etc. All of the words quoted except the name "Johannah Von Lukowitz", appear in the printed part of the form of the information, the name itself being written in ink. Further down, in the second clause, written also in ink, are words charging the defendant with receiving from the said Johannah Von Lukowitz, the earnings of her prostitution". In our opinion this contention is without merit.

It is further contended that this second clause in the information is defective and fails to charge an offense in that it does not specify the amount of money or what things of value were taken or received from her. With this contention we do not agree. This is not like a case of larceny. The extent of the defendant's offense, if any, is in no way dependent upon the amount of money or the value of the things taken. The gravamen of the offense is not in the taking or receiving of money or other things of value, but lies in the fact that whatever is taken or received, is from the earnings of the prostitution of a woman.

Neither do we agree with the contention that this clause is defective, in that it fails to specify whether defendant is charged with having taken or received or accepted the money or other thing of value, but uses the three words, "take, accept or receive" etc. These words are used synonymously and cannot reasonably be construed in any other way. This paragraph sufficiently charges a crime under the statute.

Defendant further contends that the second paragraph is fatally defective in that it fails to include any allegation of the time and place of the doing of the acts complained of, as it would have if it had contained the usual phrase "did then and there", so as to relate back to the time and place alleged in connection with the first paragraph. This point is untenable. This was not an indictment with a number of separate and distinct counts. The case is based on the information making three different charges against the defendant, all amounting to the crime of pandering, and while we have referred to the parts of the information containing each

It is further stated that this person was in the possession of a license to sell liquor in the State of New York, and that he was also in the possession of a license to sell liquor in the State of New Jersey. It is further stated that this person was in the possession of a license to sell liquor in the State of New York, and that he was also in the possession of a license to sell liquor in the State of New Jersey. It is further stated that this person was in the possession of a license to sell liquor in the State of New York, and that he was also in the possession of a license to sell liquor in the State of New Jersey.

It is not to be taken as a criticism of the work of the Commission that it has not been able to produce a more complete report. The Commission has been very busy with the work of the Commission and has not had time to produce a more complete report. The Commission has been very busy with the work of the Commission and has not had time to produce a more complete report.

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of these charges, as paragraphs and defendant's counsel refers to them as counts, in fact the information is so written as to contain but one paragraph, without any punctuation between the parts making these different charges. In that form the time and place set forth in the first part of the information clearly applies to all the allegations it contains.

Before any evidence was heard in this case, the defendant moved the court to compel the prosecution to elect upon which charge they would go to trial. The denial of that motion is assigned as error. Aside from the question as to whether this was a proper case for an election, the defendant is not in a position to raise the point. The question of when the prosecution shall be required to elect upon which charge or count it will seek a conviction, if at all, is within the sound discretion of the court. It cannot be said that a court has abused that discretion in overruling such a motion as this, when it is made before any evidence has been heard and is not renewed at the close of the prosecution's case, 22 Cyc. 405-406. That is the situation disclosed by this record.

As to the ruling of the trial court, denying the defendant's motion for a bill of particulars, also assigned as error, it is our opinion from a careful examination of the record, that the defendant was not in any way injured by such ruling, and therefore it cannot be considered ground for a reversal of the judgment. It is only when it is made to appear that the defendant cannot properly prepare his defense without a bill of particulars, that the court will require the prosecution to furnish one. People v. Hall, 242 Ill. 284, 290 and cases there cited. No such showing was made here.

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ruling, and therefore it cannot be considered ground for a
reversal of the judgment. It is only when it is made to appear
that the defendant cannot properly proceed his defense without
a bill of particulars, that the court will require the process
also to furnish such bill. See Ill. 184, 185 and
cases there cited. No such showing was made here.

It is further contended by the defendant that this judgment should be reversed because the court permitted the prosecution to show by oral testimony, in cross-examining the defendant, that he had theretofore been convicted of a crime not in any way connected with the one involved in the case at bar. This trial was had in the court below without a jury and in such case it is presumed on writ of error that the trial court in finding the defendant guilty and entering judgment accordingly, considered only the competent evidence. People v. Jacoby, 198 Ill. App. 33. The finding of a court in a trial without a jury, will not be disturbed notwithstanding the admission of incompetent evidence, where there is enough other testimony of unquestioned competency sufficient to sustain it. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 73; Palmer v. Meridan Britannia Co., 188 Ill. 508, 518.

We have carefully examined the evidence in connection with the defendant's contention that it does not establish his guilt beyond a reasonable doubt, but was such as to require the trial court to acquit him, and we are unable to agree with it. While the evidence was flatly contradictory there is sufficient in the record, if believed, to sustain the finding of the trial court and the defendant's conviction. In that situation the judgment of the trial judge who had opportunities to judge of the credibility of the witnesses, which we cannot have, should not be disturbed.

It is further contended by the defendant that the trial court erred in not finding the age of the defendant and in sentencing him to the House of Correction rather

than to the Illinois State Reformatory, as he alleges the Parole Act of 1917, requires. The case at bar does not come within the provisions of that Act. The Pandering Act, under which defendant has been convicted, provides for imprisonment "in the County Jail or House of Correction" and a fine, upon a first conviction, Ill Rev. Sts. (Hurd, 1917) ch. 38, Sec. 57g - p.962.

It is further provided by our statutes that any person convicted for any crime or misdemeanor, punishable by imprisonment in the County Jail, in certain counties (which would include the County of Cook) shall be committed to the House of Correction, in lieu of the County Jail. Ill. Rev. Sts. (Hurd, 1917) ch. 67, Sec.9, p.1647. The provisions of Sec. 2 of the Parole Act apply to all sentences (cases of treason, rape and kidnaping not included) "to the penitentiary or reformatory, * * * or any other state institution, * * * provided by law for the incarceration, punishment, discipline, training or reformation of persons convicted and sentenced to, or committed to such institution (not including, however, county jail)." Under the familiar rules governing the construction of statutory enactments, the phrase excluding county jail sentences from the operation of the statute last quoted, must be held to cover and include sentences to the House of Correction, in counties such as the County of Cook. This defendant was properly sentenced to the House of Correction under the provisions of Pandering Act and therefore his case does not come within the provisions of Sec. 2 of the Parole Act and consequently it would not be incumbent on the trial court to find the age of the defendant, as provided in that section, unless the court, in its discretion, committed the defendant to the Illinois State Reformatory under provisions

of Sec. 4, of the Parole Act, which the court in this case did not do.

The trial court did not err in committing the defendant to the House of Correction, rather than the Reformatory, for Sec. 4 of the Parole Act does not require that a person between the ages of 16 and 21 years (as the evidence showed this defendant to have been) "who shall be adjudged guilty of an offense punishable by imprisonment in the county jail or by a fine, or in the county jail, with or without a fine" shall or must be committed to the reformatory, but that such a person "may, in the discretion of the court", be committed to the reformatory.

Finally the defendant contends that the judgment and sentence of the trial court deprives him of his liberty without due process of law and in violation of his rights guaranteed to him under the constitution of Illinois in that (1) the information is uncertain as to time in reciting that he committed the alleged offense "on or about 15th day of December, A. D. 1917," (2) the information does not aver that the crime was committed, "in the year of our Lord," and (3) so much of the information as is contained in the second charge, on which he was convicted, is not specific in that it fails to allege that the offense charged was committed after the enactment of the Pandering Statute of 1917, which went into effect July 1, of that year, under the provisions of which that charge was laid.

An information charging that an offense was committed, "on or about" a given date, is sufficient. 22 Enc. 317. Especially is this so under our statute providing that no writ of error shall be sustained for any matter not affect-

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ing the real merits of the offense charged.

The use of the letters "A.D. 1917, " were sufficient to show that the offense was committed in the year of our Lord 1917. Joyce on Indictments, Sec. 195.

The last point urged by the defendant likewise refers to the validity of the information. It is urged that the information is insufficient in its failure to show on its face that the alleged offense, referred to in the second paragraph of the information, occurred after the Statute of 1917 on the subject of pandering, became a law, that statute having added the offense in question to those included within the previous law on this subject. As to this point it is sufficient to say that the statute in question went into effect on July 1, 1917 and the evidence shows that all the acts charged in the second paragraph, on which the defendant was found guilty, took place after that date. The defect in question was at most a formal one, and this point might have been urged in support of a motion to quash, in which case the formal defect might have been remedied by amendment; but after judgment and evidence showing the facts to be as we have stated, such formal defect cannot occasion a reversal of the judgment. People v. Weber, 152 Ill. App. 102.

Finding no error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

THE COURT OF THE DISTRICT OF COLUMBIA

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24496

JEROME C. BANCROFT, ET AL.
Appellants.

vs.

WINIFRED C. VELTMAN, ET AL.
Appellants.

213 I.A. 647

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT, COCK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal from an interlocutory order appointing a receiver without notice. It is urged that the order should be reversed by reason of the fact that neither the bill of complaint nor the affidavit accompanying it, contains such an averment of facts, as warranted the trial court in appointing a receiver without notice.

It is a well settled rule that notice of the application for the appointment of a receiver, must be given unless it is made to appear clearly that such action should be taken without notice. Musbaum v. Locke, 53 Ill. App. 242. It is equally well settled that in order to make such a showing as will justify the appointment of a receiver without notice, the moving party must allege facts in his bill or in an affidavit supporting his motion, which clearly show that the defendant will probably take such steps as will materially prejudice him if notice of the application is given. Becker v. Defebaugh 66 Ill. App. 504; Suburban Construction Co. v. Naugle, 70 Ill. App. 384, 398.

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In the bill filed in the case at bar the complainants allege that certain of the defendants had taken preliminary steps to organize the Hanover Life and Casualty Insurance Company; that they had sold a considerable amount of stock to a large number of people including these complainants; that they had never completed the organization of the company but had ultimately abandoned it; that certain of the incorporators and officers of the company, who had been made defendants, had converted the funds realized from the sales of stock to their own use; that all of these funds rightfully belonged to the complainants and other purchasers of said stock; that the defendants were liable for these funds so wrongfully appropriated and should be required to account for the same; that one Hodges, a defendant, collected a large sum of money belonging to the company which he unlawfully retained under the guise of fees for services rendered to the company; that the officers of the company unlawfully caused an automobile to be purchased, for which \$1350.00 was expended, which expenditure was unnecessary and useless; that Hodges, in collusion with other officers of the company, took possession of and retained the automobile and that it now is in his possession and that it rightfully belongs to said subscribers for stock of said company; that there remains belonging to said subscribers, certain office furniture of the value of \$250.00, all the books, records and documents belonging to the company, money on deposit in the bank amounting to \$11.74 and the said automobile now in the possession of Hodges; that unless a receiver is appointed by said court at once, and without notice, the remaining assets belonging to the subscribers for stock will be attached by creditors, and that said Hodges, who, your orators are informed, is not financially responsible, will dispose of said Overland

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automobile, to the injury and irreparable loss of your exorers."

It will not be necessary to refer to the further allegations of the bill, as we are not called upon, on this appeal to pass upon its sufficiency so far as the general merits of the case are concerned, nor in any respect, save as to the single point here involved, namely, whether these allegations of fact are sufficient to warrant the appointment of a receiver without notice. No allegations of fact were set forth by affidavits.

In our opinion the trial court did not err in allowing the motion appealed from. That part of the allegations of fact as contained in the bill, which we have included within quotation marks above, was sufficient to warrant the court in taking that action, especially in view of the other general allegations of fact which were made in the bill and which we have briefly recited. The property for which the court was asked to appoint a receiver was, under the allegations of fact contained in the bill, not that of any of the defendants nor of any active business or going concern, but a company which had been in the process of organization, such organization having been later abandoned. So far as the automobile, which seems to be the principal remaining asset, is concerned, it is interesting to note, though the fact is not controlling, that Hodges is not one of the appellants here and is apparently making no complaint about the action of the court, in appointing a receiver without notice.

For the reasons stated, the order of the Superior Court appealed from, will be affirmed.

AFFIRMED.

NICHOLAS BERWICK et al.,
Defendants in Error.

vs.

OSCAR G. FOREMAN, JOSEPH E. OTIS,
PETER S. LYNCH, JOHN J. MITCHELL,
and MICHAEL O'CONNOR, Trustees of
the Police Pension Fund of the
City of Chicago,
Plaintiffs in Error.

213 I.A. 647

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE McSABLY DELIVERED THE OPINION OF THE COURT.

Petitioner, a member of the police department of the City of Chicago, sought by mandamus proceedings a pension from the Police Pension Fund and was awarded the writ by the trial court. The respondents have sued out of this court a writ of error. We are of the opinion that as the decision upon the issue presented involves the validity of a statute, the writ of error should have been sued out of the Supreme Court and not the Appellate Court.

On March 31, 1917, the petitioner having completed a service of twenty years as a member of the police department, was entitled to a pension under the statute then in force providing "for the setting apart, formation and disbursement of a police pension fund." Proper application was made therefor on that date. Subsequently, that is on July 1, 1917, an amendment to this law went into effect, which created an additional condition precedent to the right to a pension, namely, that the police officer shall have reached the age of 50 years. From the record it appears that petitioner does not qualify as to this additional requirement. It was also

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provided by the amendment of July 1, 1917, that "no pension shall be granted to any policeman after March 1, 1917, unless such policeman shall be qualified for retirement or for a pension as in this Act provided; the intention being that the terms and conditions of retirement and of the granting of pensions for such policemen under this section shall be retroactive in their effect, and shall relate to all applicants for pensions after the date aforesaid."

Giving this clear and definite language effect, petitioner is not entitled to a pension. But, he says, that as all the requirements and conditions entitling him to a pension had been fully completed under the law as it then was, he had a vested right to a pension which could not be taken away by subsequent legislation and that the amendment undertaking to do this is in conflict with the provision of the constitution that no person shall be deprived of property without due process of law. Article II, sec. 2. We see no escape from the conclusion that the determination of this contention involves the validity of the amendment of July 1 insofar as its retroactive features are concerned.

The writ properly should have been sued out of the Supreme Court, and pursuant to section 102 of the Practice Act the clerk of this court is directed to transmit the transcript and all files therein with the order of transfer to the clerk of the Supreme Court.

TRANSFERRED TO THE SUPREME COURT.

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provision of the amendment of 1917, which was passed
shall be granted to any person after March 1, 1917, unless
such person shall be qualified for retirement or for a
pension as in this act provided; the pension shall be
the same as provided in the act of 1917 and in the
act of 1918. The same person shall not be entitled to
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applicable provisions of law as if they were not.
That this act shall not be construed to affect
provisions in any contract or agreement, or in any
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made by a person who is a citizen of the United States,
as it then was, he has a vested right to a pension which
shall not be taken away by subsequent legislation and that
the amendment notwithstanding to do this is in conflict with the
provisions of the constitution that no person shall be deprived
of property without due process of law. Article II, sec. 2.
To see no change from the constitution that the determination of
this question involves the validity of the amendment of
1917. Inasmuch as its retroactive force is concerned.
The will properly should have been made out of
the Supreme Court and answer to section 102 of the
constitution and the fact of this court is divided so
between the majority and all other persons with the
majority is divided in the case of the Supreme Court.
The majority is divided in the case of the Supreme Court.

289 - 23634

FRANK L. BOEHME,
Appellant,

vs.

ASHTON G. STEVENSON.

WILBUR S. SCUDDER, in-
tervening petitioner,
Appellee.

213 I.A. 647

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, from a judgment finding the right to certain property in the intervening petitioner, in an attachment proceeding.

On April 7, 1912, the defendant (Stevenson), being the owner of record of 451.2 shares of the capital stock of the Chicago Line-Tabler Company, entered into a written agreement with the intervening petitioner (Scudder), by the terms of which he sold and assigned to the latter 450 shares of the said stock. Thereupon the certificate for 451.2 shares, duly assigned, was delivered to one Miner, who, the evidence shows, was the agent of the intervening petitioner, with directions to surrender same to the company for transfer, and to procure in lieu thereof two stock certificates, - one for 450 shares to be issued in the name of the intervening petitioner, and the other for 1.2 shares to be issued to the plaintiff.

On April 9, 1912, the said certificate was presented at the office of the said company but owing to the absence of its secretary the stock was not transferred on its books.

On April 11, 1912, plaintiff (Boehme), sued out a writ of attachment against the defendant, a nonresident, to recover a balance of wages alleged to be due him, and caused the said Chicago Line-Tabler Company and its president to be summoned as

garnishees.

Answers were filed by the garnishees in which it was admitted that at the time of the service of the garnishment summons on them there appeared of record in the name of the defendant 451.2 shares of the capital stock of the said company. The said Scudder filed an intervening petition in said suit, in which he claimed to be the owner of 450 of the said 451.2 shares of said capital stock, under the aforesaid contract of sale.

Upon a hearing without a jury, the court found the issues for the plaintiff and assessed his damages against the defendant (Stevenson) at the sum of \$331.00, but found the right to the said 451.2 shares of stock in Scudder, the intervening petitioner.

It is insisted by plaintiff that the court erred in finding the issues in favor of the intervening petitioner, first, because it is undisputed that at most the latter was entitled to only 450 shares of the said stock, and, second, because the transfer of the said stock by the defendant to the intervening petitioner was fraudulent.

As to the first contention, it clearly appears that the court erred in finding the intervening petitioner entitled to 451.2 shares of the said capital stock, as under the aforesaid contract of sale he was entitled to but 450 shares, and for this reason the judgment must be reversed and the cause remanded.

As to the second contention, there is no evidence in the record impeaching the bona fides of the contract of sale of the 450 shares of the said capital stock to the intervening petitioner, and hence plaintiff's contention in this respect is without merit.

Answers were filed by the defendant in which it was
 admitted that at the time of the execution
 of the deed there were no other persons or persons of the
 same name as the defendant or person in the name of the
 defendant at the time of the execution of the deed except
 the defendant. It was also admitted that the defendant
 was the only person who was present at the execution of the
 deed and that the defendant was the only person who was
 present at the execution of the deed.

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When a hearing without a jury, the court found the
 issues for the plaintiff and entered its judgment in
 favor of the plaintiff. At the time of the hearing the
 court found that the defendant was the only person who
 was present at the execution of the deed and that the
 defendant was the only person who was present at the
 execution of the deed.

verdict rendered.

It is further by plaintiff that the court found in
 finding the issues in favor of the intervening petitioner, that
 because it is undisputed that at the time the deed was
 executed the defendant was the only person who was present
 at the execution of the deed and that the defendant was
 the only person who was present at the execution of the
 deed.

As to the issue of the deed, it clearly appears that
 the court erred in finding the intervening petitioner entitled
 to the deed. At the time the deed was executed, the
 defendant was the only person who was present at the
 execution of the deed and that the defendant was the
 only person who was present at the execution of the deed.

As to the issue of the deed, there is no evidence
 in the record supporting the plaintiff's contention that
 the defendant was the only person who was present at the
 execution of the deed. The court found that the
 defendant was the only person who was present at the
 execution of the deed and that the defendant was the
 only person who was present at the execution of the deed.

It is contended on behalf of the defendant that the judgment for \$331.00 in favor of the plaintiff is unsupported by the evidence.

The said judgment against the defendant, and the finding of the right to the stock in question in the intervening petitioner, were wholly independent of each other, although included in the same entry on the record. No appeal having been taken from the former, it is not here presented for review. Wells v. Miller, 45 Ill. 382; Horn v. Berg, Ill. App. First District, #23249, not yet published.

Accordingly the judgment will be reversed and the cause remanded, with directions to proceed in conformity with the views hereinabove expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

It is submitted on behalf of the Government that the
Indigents for whom the Government is responsible
by the law.

The first Indigent Relief Act, 1834, and the
second of 1839, have been the subject of the following
provisions, which have been the subject of the following
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383 - 23728

JOHN F. DEVINE, Administrator
of the estate of Francisco
Mauzei, deceased, Appellee,

vs.

CHICAGO RAILWAY COMPANY, a
corporation, Appellant.

213 I.A. 647

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$4,000 against appellant (defendant below), in an action for damages for negligently causing the death of plaintiff's intestate, hereinafter referred to as the deceased, who was killed on September 9, 1921, while in defendant's employ.

The fatality occurred at the intersection of Dearborn and Van Buren streets, in the city of Chicago. The former runs north and south, the latter east and west. Defendant operates a double track car line on each.

At the time of the fatal accident, defendant was engaged in reconstructing its crossing at the intersection of the two aforesaid streets. Between the rails of the tracks at and near the said intersection, defendant was excavating for the purpose of removing underground construction work. The deceased was engaged in such work between the two rails comprising the southbound, or westerly, track on Dearborn street, just south of the north crosswalk of Van Buren street. At the place where he worked, the space was excavated to a depth of about twenty inches below the ties. While this work was going on, the operation of defendant's cars was not discontinued although the intersection was temporarily closed to general vehicle traffic. The deceased, while thus engaged in the said excavation was

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THE OFFICE OF THE
ATTORNEY GENERAL
STATE OF NEW YORK

IN SENATE
JANUARY 10, 1911

REPORT OF THE
COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 10, 1911

ALBANY: J. B. LIPPINCOTT COMPANY, 1911

PRINTED BY THE COMMISSIONER OF THE LAND OFFICE

THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE

REPORT OF THE COMMISSIONER OF THE LAND OFFICE, DATED JANUARY 10, 1911,

AND TO TRANSMIT THE SAME TO THE SENATE, AS REQUESTED BY A RESOLUTION

PASSED BY THE SENATE, JANUARY 10, 1911, AND TO THE HOUSE OF REPRESENTATIVES,

AND TO THE COMMISSIONER OF THE LAND OFFICE, FOR HIS INFORMATION.

ATTEST: J. B. LIPPINCOTT COMPANY, PRINTERS.

AT THE CITY OF NEW YORK, THIS 10TH DAY OF JANUARY, 1911.

JOHN B. LIPPINCOTT, COMMISSIONER OF THE LAND OFFICE.

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was struck by a passing car, causing his death.

The gravamen of the charge against defendant was the negligent operation of its car, and the failure to warn deceased of its approach.

Defendant contends that the verdict is clearly and manifestly against the weight of the evidence.

It appears from the evidence that prior to the accident, cars had passed over the said intersection at intervals of about five or six minutes, and that in order to avoid being struck, the workmen stepped out of the excavation until the car had passed, after which they would return and resume their work; that the deceased, however, instead of stepping out of the excavation upon the approach of a car, in several instances stooped or squatted therein while the car passed.

The evidence also shows that a policeman was stationed at said crossing, whose duty it was, among other things, to regulate the traffic; that cars approaching the intersection generally came to a stop before the crosswalk, where they discharged and took on passengers, and upon signal from the policeman, proceeded on over the intersection.

It is undisputed that the car in question, upon approaching the said intersection made two stops, - one at a switch located about fifty feet north of the north crosswalk of Van Buren street, and the other at the said crosswalk, at which latter place there was a short wait; that when the policeman sounded the whistle it proceeded south very slowly, the motorman sounding the gong continually while passing the said crosswalk and intersection.

Apparently no one saw the deceased as the car approached the excavation in which he worked, and there was but one eye-witness (Hoffman) to the accident. He testified that he was crossing the intersection diagonally from the southwest to the northeast corner, when he noticed the car in question coming along Dearborn street from the north, moving very slowly; that

was shown by a drawing and, naming his work.

The drawings of the bridge against the wall and the
vertical position of the car, and the bridge as seen from
the side.

Witness contends that the vehicle is clearly not
necessarily against the weight of the witness.

It appears from the witness that in the

position, the car is shown from the side, and the position of the bridge
is shown from the side, and that in order to be in position

against the vertical position of the bridge, the car is
not shown, but the car is shown from the side, and the car is shown

from the side, however, instead of being out of the

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The witness also states that a witness was present

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as he was standing there, "a head bobbed up out of a hole which was there, and immediately the car struck it;" that "the head bobbed up after the fender and part of the platform had already passed over."

Stickem, the policeman who was on duty on the morning of the day in question, testified that on several occasions when cars passed the excavation where the construction gang worked, the deceased, instead of stepping from the track as the other workmen did, would stoop in the hole while the car passed over him; that he warned deceased that it was dangerous to do so and advised him that it would be safer to step aside while cars passed. Dempsey, the paving foreman for defendant at the time of the accident, also testified that on the day in question he noticed the deceased stoop in the excavation while cars passed over him, and that he also warned deceased that this was dangerous. McGrath, the policeman who was on duty at said intersection when the accident occurred, testified as follows:

"When the cars came along there he used to stay right in the hole and they would pass right over him. I told him he ought to get out of the hole. He said, 'That is all right, John.' * * * I seen the hole was so small; I was afraid an accident would happen. That was about ten minutes before the time of this accident. When the car went by he raised his head up and sometimes he would laugh."

It is urged by plaintiff that a custom existed on the part of defendant to warn the men in the excavation of the approach of cars; that the custom of watching out for the cars where an employee was in the position in which deceased was, was a promise on the part of defendant to continue to do so, and that the failure to observe such promise constituted negligence on its part.

A careful examination of the evidence fails to reveal the existence of any such custom to warn the men. On the contrary, it shows that each workman, including the deceased, was required to and did in fact look out for approaching cars while working at the said intersection; that when several men worked

together, frequently the one who first noticed or heard an approaching car would warn the others thereof; that occasionally the foreman or "straw boss" of the gang, if close by, would give similar warning to the men,

This was an intersection point where cars usually came to a complete stop to take on or discharge passengers and then waited for a signal from the crossing policeman before proceeding across. It is undisputed that prior to the time of the accident southbound cars had been passing this intersection every five or six minutes throughout the day, and that no one was regularly stationed to give warning of their approach. Necessarily the deceased, who had been working there all that day, must have been fully aware of this situation, and hence, in the exercise of ordinary care he should have anticipated that cars would continue to pass the intersection at such intervals. Consequently it cannot be said that he was warranted in relying upon a special warning to notify him of the approach of each car. And when we take into consideration the undisputed testimony of the three witnesses who stated that the deceased, on several previous occasions, had remained in the excavation while cars passed over him, against their express warning, together with all the other facts and circumstances in evidence, the conclusion is irresistible that the deceased knew it was dangerous to remain in the said excavation while cars passed; that he was aware of the approach of the car in question; and that he stooped in the excavation to allow it to pass over him, thereby receiving the fatal injury. It follows, therefore, that the verdict is clearly and manifestly against the weight of the evidence.

In this view of the case it becomes unnecessary to discuss the other points raised on this appeal.

Accordingly the judgment will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

[illegible]

FINDING OF FACTS:

This court finds as facts:

1. That the deceased knew it was dangerous to remain in the said excavation while cars passed.
2. That he was aware of the approach of the car in question.
3. That instead of stepping out of the excavation and off the track, he negligently remained therein and was thereby fatally injured.

REPORT OF THE

THE BOARD OF DIRECTORS

OF THE COMPANY

FOR THE YEAR ENDING

AT THE ANNUAL MEETING

HELD AT

ON THE

DAY OF

IN THE YEAR

THE BOARD OF DIRECTORS

OF THE COMPANY

THE BOARD OF DIRECTORS

OF THE COMPANY

FOR THE YEAR ENDING

AT THE ANNUAL MEETING

HELD AT

ON THE

DAY OF

IN THE YEAR

THE BOARD OF DIRECTORS

OF THE COMPANY

FOR THE YEAR ENDING

AT THE ANNUAL MEETING

HELD AT

ON THE

WINIFRED FISHER, Adminis-
tratrix of the estate of
George Fisher, deceased,
Defendant in Error,

vs.

THE CHICAGO, ROCK ISLAND &
PACIFIC RAILWAY COMPANY, a
corporation,
Plaintiff in Error.

213 I.A. 648

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment for \$10,000 in favor of the plaintiff, in an action on the case, brought under the Federal Employers' Liability Act, for negligently causing the death of plaintiff's intestate, hereinafter referred to as the deceased, while in defendant's employ.

The fatality occurred on the night of August 16, 1913, in defendant's yards at Peru, Illinois. At the place in question defendant's main-line tracks run east and west. The deceased was the locomotive engineer of a westbound freight train operated by defendant. When the train arrived at Peru, the engine, with the foremost three cars, was detached from the rest of the train and proceeded west a sufficient distance to clear a switch leading from the westbound main-line track to a side-track just north of and paralleling same. After the said switch was lined up with the side-track by a member of the train crew, the engine and cars were backed onto the said side-track and coupled onto 19 additional cars standing thereon, whereupon the deceased was signalled to proceed ahead with the train of cars, to the westbound main-line track, in doing which the train encountered a switch which diverted it

onto another track known as the "turntable lead," with the result that the engine ran into a turntable pit and tipped over, whereby the deceased was fatally scalded by escaping steam.

The switch leading to the said turntable track connected with the side-track, and was located about 200 feet east of the switch connecting the westbound main-line track with said side-track. The distance from the turntable switch to the turntable pit was about 100 feet, with a slight down-grade toward the pit. There was a switch-stand on the north side of the turntable switch. At the top of this stand was a lamp with colored lenses, which, when the lamp was lighted, indicated the position of the said switch. The evidence showed that at the time of the accident, this lamp was not lighted.

The evidence showed further, that it was customary to keep the turntable switch lined up for the turntable track, except when switching was being done on the side-track, in which latter event the turntable switch would be lined up with the side-track by the train crew, and left in that position until the switching was completed; that the deceased knew of such custom, and that in the performance of his duties he received and was governed by signals from his train crew; that on the night of the accident, this turntable switch was left lined up with the turntable track when the deceased received the signal to back the engine and three cars onto the side-track and over the turntable switch, the points of which receded sufficiently to permit the flanges of the engine and car-wheels to pass, but sprang back into their former position, i. e. in line with the turntable track, immediately thereafter; that consequently, when the said 19 cars had been coupled thereto, the "go ahead" signal given, and the train moved west toward the main-line track, it was deflected by the said turntable switch onto the turntable track, with the result already stated.

The negligence relied upon by plaintiff was, (1)

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to the records which listed as for the present day, except

...before the court...

(1) The negligence relied upon by appellants was

the failure of the defendant to properly set the turntable switch, before signalling the deceased to back the engine and cars over it, (2) the signalling of the deceased to run the engine and train of cars from the side-track to the westbound main-line track, while the said turntable switch was in line with the turntable track, (3) the failure of the defendant to keep lighted the switch lamp at the top of the turntable switch-stand, at and just prior to the time of the accident, and (4) the failure of the defendant to provide the deceased with a reasonably safe place to work.

Defendant, while admitting the failure of its servants to properly set the turntable switch before signalling the deceased to move his train over it, and its failure to have the switch-lamp lighted, at and just prior to the time of the accident, contends that, notwithstanding such omissions, in accordance with a rule of the company familiar to the deceased, it was his duty, in the absence of the said switch-light, to either stop the train or have it under complete control, before passing over the turntable switch on his return to the westbound main-line track; and that, even after having passed over the turntable switch and into the track, turntable/ he should have discovered the impending danger in time to avert the accident.

Whether or not, after the engine had passed the turntable switch and run onto the turntable track, the deceased, in the exercise of due care, should have discovered his predicament in time to avert the accident, was, under the evidence, a question of fact for the determination of the jury, as was also the question whether or not the alleged violation of the aforesaid rule relied upon by the defendant, was the proximate cause of the accident. The jury by their verdict have resolved both these issues in favor of the plaintiff. In view of the fact that the deceased, in the performance of his duties, was necessarily obliged to rely upon the signals from the train crew, whose duty it was to see that the said turntable switch was lined up with the side-track

the failure of the defendant to properly use the convertible switch, where signaling the deceased to back the engine and turn the wheels (2) the signaling of the deceased to run the engine and train at once from the side-track to the westbound main-line track, while the convertible switch was in line with the turntable track; (3) the failure of the defendant to keep lighting the switch lamp at the top of the convertible switch-stand, at and just prior to the time of the accident; and (4) the failure of the defendant to provide the deceased with a reasonably safe place to work.

Defendant, while admitting the failure of the convertible switch to back the engine and train before signaling the deceased to move his train over it, and its failure to have the switch lamp lighted, at and just prior to the time of the accident, contends that, notwithstanding such omissions, in accordance with a rule of the company familiar to the deceased, it was his duty, in the absence of the said switch-light, to allow the train to pass it under complete control, before passing over the convertible switch on his return to the westbound main-line track; and that, after the train having passed over the turntable switch and into the turntable track, he should have discovered the impending danger in time to avert the accident.

Whether or not, after the engine had passed the turntable switch and run onto the turntable track, the deceased, in the absence of the case, should have discovered his predicament in time to avert the accident, was, under the evidence, a question of fact for the determination of the jury, as was also the question whether or not the alleged violation of the deceased rule relied upon by the defendant, was the proximate cause of the accident. The jury by their verdict have resolved both these issues in favor of the plaintiff. In view of the fact that the deceased, in the performance of his duties, was necessarily obliged to rely upon the signals from the train crew, whose duty it was to see

before signalling him to back his train thereon; that it was customary for the train crew to leave the said switch so lined up with the side-track until the switching was completed; that it was the duty of the defendant to maintain a light at the turntable switch-stand; that the distance intervening between the turntable switch and the pit was short; that there were 22 cars attached to the engine, 19 of which had no air-brake connection; that the turntable track was slightly down-grade toward the pit; that the train had gained some momentum, together with all the other facts and circumstances in evidence, - we are of the opinion that the jury were warranted in finding that the proximate cause of the accident was the failure of the defendant to perform its aforesaid duties, and not any neglect of duty or violation of rules on the part of the deceased. U. P. R. R. Co. v. Hadley, 38 Sup. Ct. Rep. 318.

Defendant next contends that the court erred in refusing to give to the jury certain instructions offered on its behalf. The instructions referred to dealt entirely with the conduct of the deceased after he started to move the engine west on the side-track toward the turntable switch, and singled out certain facts which the defendant evidently desired to give prominence before the jury. Such instructions have been repeatedly condemned by our Supreme court, as being highly misleading (Eckels v. Mutschall, 230 Ill. 462), and hence, in our opinion, they were properly refused. Furthermore, the questions so sought to be brought to the attention of the jury were fully covered by other instructions given on behalf of the defendant.

Complaint is also made of the giving of instruction No. 3 on behalf of the plaintiff, the last paragraph of which stated:

"If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence."

Under the Federal Employers' Liability Act, the burden

[illegible]

rests upon the defendant to prove contributory negligence by a preponderance of the evidence [Cent. Vt. Ry. v. White, 238 U. S. 507). Defendant contends, however, that the instruction in question limited the jury to a consideration of only the evidence offered on its behalf, while it was entitled to the benefit of any evidence introduced by plaintiff which might tend to show contributory negligence on the part of the deceased, as well. In our opinion, this instruction is not susceptible of such construction, and the jury could not reasonably have so understood it. If defendant's position were tenable, its given instruction No. 6 would be open to like criticism, for it told the jury, in similar language, that it was plaintiff's duty to prove negligence by a preponderance of the evidence.

It is further contended that the court committed reversible error in the giving of instruction No. 2 on behalf of plaintiff. This instruction was as follows:

"If you believe from the evidence * * * that the death of said Fisher resulted in whole or in part from the negligence as charged in the declaration of any of the officers, agents or employees of said defendant, * * * you should find the defendant guilty."

The objection made by defendant to this instruction is, that the italicized portion was misleading, because plaintiff had abandoned three counts of the declaration and the jury were not instructed to disregard them; that hence, the instruction authorized them to find for the plaintiff on the abandoned counts, which there was no evidence to support.

As we understand the rule, it is not error to instruct the jury in the language of the instruction complained of, if there is evidence in the record tending to support any count of the declaration, proof of which would sustain a recovery (Schlauder v. C. & So. Trac. Co., 253 Ill. 154; C. C. Ry. Co. v. Foster, 226 Ill. 288; U. S. Brg. Co. v. Stoltenberg, 211 Ill. 531; W. C. St. R. R. Co. v. Buckley, 200 Ill. 260). Furthermore, it appeared that the aforesaid counts had been withdrawn

before the jury were instructed, and, presumably, in their presence. In such circumstances, the error complained of was clearly harmless. W. C. St. R. R. Co. v. Buckley, 200 Ill. 260.

Other points have been urged by defendant, but we shall not discuss them here, save to say that, in our opinion, they are not of sufficient moment to warrant disturbing the judgment. Accordingly, it will be affirmed.

AFFIRMED.

JOSEPH BANDZERA, a minor,
by Wiktorja Kania, his next
friend,

Appellee,

vs.

STANDARD STEEL CAR COMPANY,
a corporation,

Appellant.

213 I.A. 648

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Joseph Bandzera, a minor, by Wiktorja Kania, his mother, as next friend, brought an action on the case against the Standard Steel Car Company, a corporation, defendant, to recover damages for injuries received on April 8, 1913, through the alleged negligence of defendant, while in its employ. A jury trial was had, resulting in a verdict and judgment against defendant for \$15,000.00, - to reverse which this appeal is prosecuted.

Defendant, at and prior to the time of the accident, was engaged in the manufacture of railroad freight cars, its plant being located at Hammond, Indiana. Plaintiff, a resident of Chicago, was employed by the defendant in its said plant, as a rivet heater. The plant consisted of two buildings, - one being known as the main building, and the other, a smaller structure, as the "lean-to" building. The main building, which extended north and south, was about 2,000 feet long and about 160 feet wide, and was supported on each side by a row of steel columns, extending lengthwise of the building. Between the two rows of columns, two traveling cranes, with hoisting apparatus, were operated, each spanning the main building, and moving upon rails fastened on the inside of the steel columns, extending practically the full length of the main building.

The lean-to building was attached to and opened into the east side of the main building in such a manner as to be

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practically a part thereof. This lean-to building was about 86 feet long and 50 feet wide. Narrow-gauge tracks, upon which trucks were operated, ran east and west from the main building into the lean-to building. Steel car-bottoms or sills, about 40 feet long and weighing several tons, were punched, pressed, and put together in defendant's main building, after which they were, by means of the traveling crane, hoisted and moved to the narrow-gauge tracks, where they were lowered onto trucks and pushed into the lean-to building there to be riveted, after which they were pushed back into the main building and thence, by means of the traveling crane, carried to the construction shop located in the north end thereof.

The riveting crew consisted of three men, known as the heater, sticker and riveter. At the time of the accident, plaintiff, who was then under 16 years of age, was a rivet heater, in charge of an oil-burning furnace located in the lean-to building, a few feet east of one of the column supports of the east side of the main building, where he had been working for several months prior to the injury.

There is a conflict in the evidence as to the manner in which the accident occurred. According to plaintiff's version, the riveting crew of which he was a member, had just finished riveting a sill, which was then pushed back into the main building and was picked up by the crane, to be carried to the construction shop; and while waiting for this to be done and for another sill to be brought in to be riveted, he leaned against the iron column nearby to rest, his left arm extending across the south side of the column, his left hand grasping the southwest corner thereof; and while in this position, the sill which had just been moved from the lean-to building and picked up by the crane, struck the column in question and cut off the fingers of his left hand. According to the testimony of witnesses on behalf of the defendant, when plaintiff was injured he was hanging on the said sill while it

was being carried by the crane.

While the amended declaration consisted of several counts, the negligence relied upon by plaintiff was, the failure of defendant to furnish plaintiff with a reasonably safe place to work, failure to warn him of impending danger, and the violation of a certain Indiana statute in relation to the employment of children under the age of sixteen years. That part of the Indiana statute upon which a right of recovery was based, provided as follows:

"Sec. 2. No child under sixteen (16) years of age shall be employed or permitted to work in any gainful occupation other than farm work or domestic service, more than forty-eight (48) hours in any one week, or more than eight (8) hours in any one day, unless the employer shall have first procured the written consent of the parent, legal or natural guardian of said child but in no event shall any such child work at any gainful occupation other than farm work or domestic service more than fifty-four (54) hours in any one week or nine (9) hours in any one day."

The said statute also provided that a violation thereof would deprive the offender of the common law defenses of contributory negligence and assumption of risk.

It is strenuously urged by defendant that the verdict is clearly and manifestly against the weight of the evidence.

It appeared from the testimony of the plaintiff, that for about two weeks prior to the time of the accident, he had been working in excess of 54 hours per week, contrary to the statute hereinabove quoted; that on the day of the accident, owing to the absence of one of the rivet heaters, he served two riveting gangs instead of one; that when they had finished riveting the car sill just before the accident, he was tired and weak, and leaned in the manner aforesaid, against the steel column just a few feet away, to rest while he was waiting for the next sill to be brought into the lean-to building to be riveted; that while his hand was on the said column, the sill which they had just finished riveting and which was being carried by the crane to the construction shop, struck the column, causing the injuries complained of. It further appeared from the evidence, that prior to the time of the accident no sill

had ever struck against any of these columns while being hoisted or conveyed by means of the crane. While certain of defendant's alleged eye-witnesses testified that plaintiff was injured while hanging onto the sill, a careful examination of their testimony reveals that either they were not in a position to see plaintiff at the time of the accident, or that they made contradictory statements regarding his position.

In our opinion, the question whether or not plaintiff was injured as a result of the failure by defendant to furnish him a safe place to work was, under the evidence, a question of fact for the determination of the jury, as was also the one, whether or not the injury was proximately caused by the alleged violation of the aforesaid section of the Indiana statute, on the part of the defendant. These issues have been resolved in favor of the plaintiff.

Inasmuch as the evidence showed that sills had, prior to the time of the accident, been handled in such a manner as to pass the steel columns without striking them, it cannot be said that plaintiff was negligent in standing where he did, a few feet from his furnace and outside the space through which the crane and car sills traveled. Plaintiff having nothing to do for the time being, and feeling tired and weak, it was but natural for him, a young boy, to lean against the nearby post to rest himself, in the absence of any other suitable convenience. And in view of the evidence, that plaintiff had been employed more than 54 hours per week, in violation of the aforesaid statute, for some time prior to the time of the accident, the jury might also have reasonably found that his injuries proximately resulted therefrom. In any event, we are not prepared to hold that the verdict is clearly and manifestly against the weight of the evidence. See Inland Steel Co. v. Yedinak, 172 Ind. 423, and Haverly Co. v. Beck, 180 Ind. 523.

Complaint is made of the refusal of certain instructions tendered by defendant, and of others given on behalf of plaintiff.

Instruction No. 34 offered on behalf of defendant and refused by the court, directed the attention of the jury solely to the question whether or not plaintiff knew defendant was about to move or raise the sill which struck him, etc. This instruction was evidently intended to refer to the entire declaration, certain counts of which charged a violation of the aforesaid statute which, if proven, would deprive defendant of the defense of contributory negligence and assumption of risk. The instruction having failed to take these counts into consideration, it was misleading and therefore properly refused. Furthermore, this instruction was in substance covered by others given on behalf of defendant.

Instruction No. 36 sought to tell the jury that defendant was not in duty bound to exercise reasonable care to provide plaintiff with a reasonably safe place to work, because such duty related only to the ways, works and instrumentalities of the service and did not extend to transitory dangers arising and existing in the work in which the employee was engaged by reason of the operation of the plant. This instruction was clearly erroneous, as the danger in connection with plaintiff's work was not ^{of} a transitory nature. See Vandalia R. Co. v. Stillwell, 161 Ind. 267.

What we have said with respect to instruction No. 34 applies also to instructions Nos. 37, 39 and 42 offered on behalf of defendant and refused by the court.

Instruction No. 43 was also properly refused, because it was apparently based on the theory that plaintiff, at and just prior to the time of the injury, was not engaged in the line of his employment. There can be no question that while momentarily resting against the steel column, waiting for work, plaintiff was acting in the line of his duty. If, on the other hand, the instruction referred to defendant's theory that plaintiff was

then hanging onto the sill and riding with it, that was covered by instruction No. 10, given on behalf of the defendant.

It is further contended by defendant, that instruction No. 7 given on behalf of plaintiff authorized the jury to assess damages for loss of earning power of the plaintiff during his minority; and defendant argues that plaintiff was not entitled to his wages during such period, and that hence the giving of the instruction constituted reversible error. Conceding that the instruction was of such a wide scope as contended for by defendant, we deem it sufficient to state that under the authority of American Car Co. v. Hill, 226 Ill. 227, it was not error on the part of the court to give it.

Defendant further complains that the damages are excessive. In our opinion, this complaint is not without foundation. While there can be no doubt that plaintiff, as a result of this accident, has been seriously injured, yet we cannot escape the conclusion that under the evidence in this case the judgment is excessive. If the plaintiff will enter a remittitur in this cause for \$5,000.00 within ten (10) days from the date of the filing of this opinion, the judgment will be affirmed for the sum of \$10,000.00, otherwise it will be reversed and the cause remanded for a new trial.

AFFIRMED ON REMITTITUR.

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CLIFFORD A. RAINFORD,
Appellee.

vs.

CHICAGO CITY RAILWAY COMPANY,
a corporation,
Appellant.

213 I.A. 648

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$4,500.00 recovered by plaintiff against the defendant, in an action on the case for personal injuries alleged to have been sustained on June 30, 1913, through defendant's negligence, while in its employ as a street car conductor.

On the day of the accident, plaintiff was in charge of a car operated by defendant on State street, between 79th street and the down town, or loop district. Prior thereto he had been employed on other routes operated by defendant, and the day of the accident was his first employment on the State street line. Pursuant to the running schedules of the defendant, between the hours of 11 A. M. and 12 M. the car crews had from 15 to 22 minutes lay-over at the outer terminus of their routes, during which period it was customary for them to eat their lunch. On the other route on which plaintiff had been employed there was always a restaurant or lunch room at the end of the line where he would have his lunch, but there was no such convenience at the south end of his run on the day in question, of which the plaintiff was unaware until after he had made the first trip, upon which he started at 4:35 that morning. Accordingly, before leaving 79th street on a later trip, he made arrangements with his motorman to stop the car in front of his (plaintiff's) house at 5912 State street, to enable him to call at his home and order a lunch prepared for him in time

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On June 25, 1915, through defendant's negligence, the ship was damaged and the cargo was lost.

On the day of the accident, Plaintiff was in charge

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11. The second and third, numbered 12 and 13, are printed schedules of the inventory, between the pages 14 and 15. The first schedule has from 16 to 25 numbered pages and the second and third, numbered 12 and 13, are printed schedules of the inventory, between the pages 14 and 15.

...for them to eat their lunch. On the other hand, it is not

room at the end of the line where he would have his lunch, but

in question, of which the plaintiff was aware until after he

and made the 2nd day, upon which he started at 4:30 AM

REPORT OF THE JOINT SELECT COMMITTEE ON THE CONDITION OF THE ARMY AND NAVY, 1877-78.

top, he made arrangements with his mother to stop the car in

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to pick it up on his return, that he might have it at 79th street in time for his lunch period, which was to have been at the end of that trip.

When the car arrived at approximately in front of plaintiff's home, the motorman stopped it in pursuance to the arrangement referred to, whereupon plaintiff alighted from the rear platform and proceeded around the rear end of the car and across the street, and while doing so was struck by a southbound car as he stepped onto the southbound track, resulting in the injuries complained of.

It is conceded by defendant that prior to the day of the accident it had rejected the provisions of the Illinois Workmen's Compensation Act. Therefore, if the accident in question arose out of and in the course of plaintiff's employment, the defense of contributory negligence is available to defendant only in reduction of the damages.

The negligence relied upon by plaintiff was the failure of the defendant to sound the gong of the southbound car while it was passing the standing northbound car from which plaintiff alighted. The evidence adduced on both sides of this issue was in irreconcilable conflict. The jury by their verdict having resolved it in favor of the plaintiff, and the court by denying defendant's motion for a new trial having approved such verdict, we are not prepared to hold that it is clearly and manifestly against the weight of the evidence, despite the strenuous protestations of the defendant as to the alleged iniquity thereof. It is a well settled rule, requiring no citation of authorities, that where the question of credibility enters into the determination of an issue, the finding of the jury is conclusive unless it is manifestly against the weight of the evidence.

It is also urged by defendant that the plaintiff, in leaving his car to order his lunch prepared, was not acting in the course of his duties, and that hence the injuries did not arise out of his employment.

Under our Compensation Act, in order to entitle a

series out of his employment.

the source is his duties, and thus under the Act, the Act did not

leaving him out to order his lunch prepared, was not acting in

his way. It is also noted by defendant that the plaintiff, in

refuse it is entitled against the source of the evidence.

the defendant's of the source, the finding of the jury is conclusive

of intention, that there the question of intention is not

relevant. It is a well settled rule, requiring no citation

despite the numerous precedents of the defendant as to the alleged

it is clearly and manifestly against the weight of the evidence,

and the court is required to hold that, we are not required to hold that

the plaintiff, and the court is required to hold that, we are not required to hold that

plaintiff. The fact of such conduct having occurred it is known of

the evidence adduced on each side of this issue was in two categories

plaintiff and defendant. Defendant was then called plaintiff.

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the defendant called upon plaintiff was the plaintiff

of the plaintiff.

plaintiff's evidence is well known to defendant only in regard to

and it was in the course of plaintiff's evidence, the defense of

plaintiff's evidence, it is known to defendant only in regard to

the plaintiff is not entitled to the evidence of the plaintiff.

It is known by defendant that prior to the day of

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person to recover for injuries received, they must occur in the course of and arise out of the employment. It has been held that an accident arises in the course of employment if it occurs "while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing;" that it arises out of the employment "when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it." (Dietzgen Co. v. Ind. Board, 279 Ill. 11.) Necessarily, each case must be governed by the attendant circumstances surrounding the injury.

Injuries sustained by a person while coming to or going from one's place of employment, arise out of and in the course of employment. (Friebe v. C. C. Ry. Co., 280 Ill. 76 and cases there cited); and it has been held that injuries sustained by an employee while going down a stairway to have lunch on another floor of the building, the stairway not being under control of the employer, were received in the course of employment. In re Sundine, 218 Mass. 1, in which the court said:

"It would be too narrow a construction of the contract to say that it was suspended when she went out for this merely temporary purpose, and was revived only upon her return to the work room. It was an incident of her employment to go out for this purpose."

Plaintiff was entitled to a reasonable period within which to have his lunch; and by implication, this included the steps necessary to procure it. Under the circumstances in the case at bar, it was clearly necessary to order his lunch in advance so that he might have it at the time and place he was to have eaten it. We conclude, therefore, that plaintiff's injuries arose out of and in the course of employment. Dietzgen Co. v. Ind. Board, *supra*; Brown v. City of Chicago, 188 Ill. App. 147; C. C. C. & St. L. R. Co. v. Martin, Admr., 41 N. E. 1051; N. C. R. Co. v. Zachary, 232 U. S. 249; Martin v. John Lovibond & Sons,

ltd., 5 N. C. C. A. 985; In re Sundias, supra; In re Von Ette, 111 N. E. 696.

It is also argued that the plaintiff, in leaving his car, acted contrary to a well established rule of the company of which the plaintiff was cognizant, and thereby took himself out of his sphere of employment. In Dietzgen Co. v. Ind. Rd., supra, the court, in passing upon a similar contention there raised, laid down the following rule which we think is applicable to the situation here presented, p. 16:

"There are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent the recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside this sphere." (Italics ours.)

It is further contended that the damages awarded plaintiff are excessive. This argument is based upon the assumption that the jury, in fixing the damages, failed to consider plaintiff's contributory negligence in reduction thereof. The jury having been properly instructed on the question of damages and the effect of plaintiff's contributory negligence, and considering the amount of the judgment in the light of the serious nature of plaintiff's injuries, we cannot say that the jury disregarded such instructions.

Other points have been raised by defendant which, however, we shall not discuss here save to say that in our opinion they are not of sufficient moment to warrant disturbing the judgment.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

486 - 23831

MATHIAS B. BROCKER, Administrator of the Estate of RICHARD RAYMOND LEVIS, deceased,

Appellee,

vs.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, a corporation, and CHICAGO & WESTERN INDIANA RAILROAD COMPANY, a corporation,
Appellants.

213 I.A. 648

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an action on the case brought by plaintiff (appellee), against defendants, to recover damages for the alleged wrongful death of plaintiff's intestate, R. Raymond Levis. The jury returned a verdict for the plaintiff, assessing his damages in the sum of \$10,000.00, and from the judgment entered thereon defendants have prosecuted this appeal.

The fatality occurred on December 2, 1914, at the intersection of 80th street with the right of way of the defendant, the Chicago & Western Indiana Railroad Company, in the city of Chicago. At the place in question its tracks run north and south, while 80th street runs east and west. The other defendant, the Chicago, Indianapolis & Louisville Railway Company, is a lessee, operating its trains over the said tracks, which at the time of the accident were being elevated. The elevation work had progressed to such an extent that only the two easternmost tracks crossed the street at grade, the others having been elevated and vehicles and pedestrians permitted to pass underneath them at the said street crossing, where a temporary wooden bridge or trestle supported the roadbed. The two easternmost tracks just referred to were still being used

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This is an action on the part of the plaintiff

(plaintiff), against defendant, to recover damages for the

amount of \$10,000.00, the sum of ten thousand dollars.

The plaintiff alleges that the defendant, on or about

the date of the accident, was operating a motor vehicle

on the highway, and that the defendant was negligent

in the operation of the vehicle, and that the defendant

was the cause of the accident, and that the defendant

was the cause of the plaintiff's injuries, and that the

defendant was the cause of the plaintiff's damages.

The plaintiff alleges that the defendant was negligent

in the operation of the vehicle, and that the defendant

was the cause of the accident, and that the defendant

was the cause of the plaintiff's injuries, and that the

defendant was the cause of the plaintiff's damages.

The plaintiff alleges that the defendant was negligent

in the operation of the vehicle, and that the defendant

was the cause of the accident, and that the defendant

was the cause of the plaintiff's injuries, and that the

defendant was the cause of the plaintiff's damages.

The plaintiff alleges that the defendant was negligent

for the operation of northbound and southbound passenger trains, while the entire freight traffic was carried over the newly elevated tracks. On the morning in question, at the said crossing the north half of 80th street was closed to traffic. This permitted the passage of vehicles through only a narrow driveway on the south half of the street, which was flanked by a row of heavy wooden posts on each side, and covered by heavy timbers supporting the roadbed about ten or twelve feet above the street level. Viewed from a distance, this passageway resembled a tunnel. Just east of the two, easternmost tracks aforesaid, and a few feet north of 80th street, was situated a wooden shanty used as a shelter by the flagman, whose duty it was to warn traffic of the approach of trains on the said two grade tracks. Owing to the presence of the posts underneath the elevated tracks at this crossing, it was impossible for vehicle drivers to see the shanty while proceeding through the said passageway from the west. Between the east end of the said passageway and the two said grade tracks there was an open space, variously estimated by the witnesses to have been from 25 to 75 feet. The passageway in question was planked, which planking extended to within a short distance of the two said grade tracks. These planks were loosely laid and caused vehicles passing over them to make considerable noise. From the passageway to the grade tracks there was a slight incline, and from the planking to the grade tracks the driveway was somewhat cut up and rough. There were no gates at either side of the said grade tracks.

On the morning in question, plaintiff's intestate was driving an automobile in an easterly direction along 80th street, and while crossing the said grade tracks, his car was struck and hurled about 40 feet, by a northbound passenger train operated by the defendant, the Chicago, Indianapolis & Louisville Railway Company, causing the instant death of plaintiff's intestate.

It is contended by the defendants that the verdict is

[illegible]

clearly and manifestly against the weight of the evidence; that the court erred in refusing to delay the case for the arrival of a certain witness, and to later re-open it upon the arrival of the said witness, after counsel for plaintiff had begun his argument to the jury; and that the court erred in overruling their motion for a new trial, because of newly discovered evidence.

The negligence chiefly relied upon by plaintiff for a recovery was, (1) the failure to keep the approaches to the said grade crossing in a safe condition, as provided by statute, (2) the failure to give plaintiff's intestate reasonable warning of the approach of the said train, (3) the failure to ring a bell or sound a whistle on said train, and (4) operation of the said train at an excessive rate of speed, in violation of a city ordinance.

The chief argument of defendants is directed at the conduct of plaintiff's intestate, just before and at the time of the accident. Great stress is laid upon the circumstances that between the east^{end} of the wooden structure or trestle and the two said grade tracks, there was an open space of some distance, in crossing which plaintiff's intestate should, in the exercise of ordinary care, have seen the approaching train and avoided the accident.

The witness Walsh, who testified on behalf of plaintiff, stated that he and the witness Nicholas were walking west on 80th street just before the accident; that they approached the two said grade tracks from the east; that he saw the automobile which plaintiff's intestate drove approaching from the west under the trestle, at which time he did not see the northbound passenger train approaching; that he heard no bell or whistle and saw no flagman on the crossing; that as they neared the said grade tracks he saw the said train coming from the south; that when the accident happened, he noticed the flagman coming out of the shanty; that the speed of the train was from 30 to 35 miles per

clearly and unambiguously against the weight of the evidence; that the court erred in refusing to delay the case for the arrival of a certain witness, and to take no action upon it upon the arrival of the said witness, after counsel for plaintiff had begun his argument to the jury; and that the court erred in overruling their motion for a new trial, because of newly discovered evidence.

The negligence chiefly relied upon by plaintiff for a recovery was, (1) the failure to keep the speedometer in the car in a safe condition, as provided by statute, (2) the failure to give plaintiff's instant personal warning of the operation of the said train, (3) the failure to ring a bell or sound a whistle on said train, and (4) operation of the said train at an excessive rate of speed, in violation of a city ordinance.

The chief argument of defendant is directed at the conduct of plaintiff's instant, that before and at the time of the accident, Great Western is held upon the circumstances that between the said instant and the said accident, there was an open space of some distance, in crossing which plaintiff's instant should, in the exercise of ordinary care, have seen the approaching train and avoided the accident.

The witness Walsh, who testified on behalf of plaintiff, stated that he and the witness Nicholas were walking west on 30th Street, just before the accident; that they approached the two said Great Western trains from the east; that he saw the instant train approaching from the east when the instant, at which time he did not see the northbound passenger train approaching; that he heard no bell or whistle and saw no flagman on the crossing; that as they passed the said Great Western he saw the said train coming from the south; that when the accident happened, he noticed the flagman coming out of the crossing; that the speed of the train was from 20 to 25 miles per

hour.

The witness Nicholas, who also testified on behalf of the plaintiff, stated that he was with the witness Walsh at the time of the accident; that he first saw the automobile approaching the grade tracks about 25 feet away; that after seeing the automobile he walked toward the tracks, and Walsh held him back; that he then looked and saw the train coming from the south, about 25 feet away; that he then stopped; that the automobile was then right on the tracks and was hit; that he saw the flagman coming out of the shanty; that before that time he had not seen him on the crossing; that he did not see anybody around, besides Walsh and himself; that his hearing was good and that he heard neither bell nor whistle; that he estimated the train was moving at the rate of from 25 to 30 miles per hour.

The witness Zeiss, who at the time of the accident was in the employ of one of the defendants and who was called to testify on behalf of the plaintiff, stated that he was working underneath the wooden trestle; that he saw the automobile of plaintiff's intestate approaching from the west; that the plaintiff's intestate seemed to be looking to the south as his car approached the grade crossing; that as the automobile passed he could not hear the approaching train; that the planks in the driveway were rather loose and made a noise when the automobile passed over them; that he heard neither bell nor whistle of any kind, although his hearing was good; that the automobile was almost on the tracks before he saw the approaching train, which he judged was moving at the rate of from 25 to 30 miles per hour; that he looked over toward the flagman's shanty but did not see the flagman.

The witness Bishop who testified on behalf of the defendants, stated that at the time of the accident he was in front of a coal office located near Parnell avenue, which was

That he estimated the train was moving at the rate of from 25 to 30 miles per hour.

The witness states, that at the time of the accident he
 is the employ of one of the defendants and who was called to
 testify on behalf of the plaintiff, stated that he was walking
 between the tracks, that he saw the automobile of
 plaintiff's intestate approaching from the west; that the plain-
 tiff's intestate seemed to be looking to the south as his car
 approached the grade crossing; that as the automobile passed he
 could not hear the approaching train; that the plian in the
 driveway were rather loose and made a noise when the automobile
 passed over them; that he heard neither bell nor whistle of
 any kind, although his hearing was good; that the automobile
 was almost on the tracks before he saw the approaching train,
 which he judged was moving at the rate of from 20 to 30 miles
 per hour; that he looked over toward the plaintiff's family bus
 and did not see the fireman.

10-11-68 The witness Bishop was recalled on behalf of the defendant, stated that at the time of the incident he was in front of a coal office located near himself, which was

about 200 feet from the scene of the accident; that just before the accident he noticed the flagman at the crossing, apparently saving someone back as if stopping traffic; that the automobile of plaintiff's intestate came suddenly into view; that it was then very near or upon the track; that he also saw a team just south of the automobile; that he later saw the train stop, and upon inquiry as to the reason therefor, learned that an accident had taken place.

The witness Quick, who was employed as flagman for the defendants at the said grade crossing and who testified on their behalf, stated that he was sitting in the shanty and saw the train coming from the south when it was somewhat south of 81st street; that 81st street was about one-eighth of a mile from 80th street; that he saw the said automobile emerge from underneath the trestle; that it was moving at the rate of from 15 to 20 miles per hour. On cross examination he stated that he was standing too far north to look into the said passageway underneath the wooden trestle, and that he did not know whether the bell on the locomotive of the said train was ringing at the time or not; that he stepped east off the track when the train approached; that "lots of trains came in there and did not ring a bell. * * * When I saw a man coming out of the subway he kept right on coming at the same rate of speed up to time train hit him. I stepped off when the train got close to me out in the street. Then I supposed he was stopping. * * * When I started to get off track automobile was half way between the subway and track, and was coming at the same rate of speed, but did not seem to pay any attention to me. I made up my mind that there was going to be something doing."

The witness Kapnick, testifying on behalf of the defendants, stated that he was in charge of an engine which was standing on the trestle right at 80th street; that he was closer

about half past four the sound of the whistle; that I saw the
 the engine at the station and the whistle, and the
 engine moving back on its stopping place; that the whistle
 of the engine, I observed some distance away that it was
 then very near to the engine; that he also saw a train that
 came to the engine; that he also saw the train stop, and
 then looking at the engine, I observed that it was
 not there.

The witness further, who was engaged in the same
 the witness at the said grade crossing and the location of
 the witness, stated that he was sitting in the engine and saw
 the train coming from the north and it was coming from
 the west; that the train was about one-half of a mile
 from the crossing; that he saw the said engine moving from
 the crossing; that it was moving to the east of the
 it is to the east of the crossing; in cross examination he stated that he
 was sitting in the engine and saw the said engine moving from
 the crossing to the east of the crossing; and that he did not see whether the
 back on the locomotive of the said train was ringing at the time or
 not; that he stopped and left the track when the train approached;
 that the train came in from the east and did not ring a bell.
 when I saw a man coming out of the engine he kept right on coming
 at the same rate of speed up to the train and him. I stopped
 and when the train got close to me in the street. Then I
 stopped. He was stopping. When I started to get off the
 locomotive was half way between the engine and track, and was
 looking at the sound of the whistle, but did not seem to pay any
 attention to me. I made up my mind that there was going to be
 something wrong.

The witness further, testifying on behalf of the
 defendant, stated that he was in charge of an engine which was
 standing on the tracks right at the crossing; that he was alone

to the east side of the trestle; that the said passenger train was going about 15 miles per hour at the time of the accident; that he did not know whether the flagman was there or not; and that he could not tell whether the bell on the locomotive of the said train was ringing. On cross examination he stated he looked also to the east but saw no flagman at the crossing.

The witness O'Hearn, who was the engineer in charge of the locomotive which struck plaintiff's intestate, stated as follows:

"Had not blown the whistle since I left Hammond. * * * Was something over an hour late. When I struck the auto it was knocked about 40 feet before it fell to the ground. * * * Had a clear view of crossing right in front of me and also right to the east of me. If there had been a man on the track I would have seen him. * * * When I was 200 feet away I could not see west of the track to the elevation. * * * Probably ten or twelve feet on either side of the track was within my range of vision at that time without turning my head to look sideways. I did not see anybody within ten or twelve feet."

The said witness testified further, that before he reduced the speed of his train it was going at the rate of 30 miles per hour, before he reached 81st street; that the morning in question was misty and foggy, although it had cleared up somewhat when the accident occurred; that when he shut off the steam and exhaust the locomotive ran smoothly and quietly.

Without further detailing the testimony of the various witnesses, it will be seen that the evidence was conflicting on the questions whether or not the flagman was on the crossing in a position to be seen by the deceased at and just prior to the time of the accident, and whether the bell of the locomotive was being sounded as it approached 80th street. The ordinance limiting the speed of trains to ten miles per hour at grade level within the city limits, was pleaded and proven, and it is conceded that the said train was being operated at a speed greatly in excess thereof. And from the foregoing testimony, we are of the opinion that the jury were warranted in finding that no bell was sounded on the

locomotive of the said train when it approached 80th street, and that the flagman was not in a proper position to warn plaintiff's intestate as he approached the said grade crossing.

Assuming that plaintiff's intestate might have seen and that he did actually see the train at a considerable distance south of the crossing after he emerged from under the trestle, yet such fact would not bar a recovery here. He had a right to rely upon the fact that defendant would operate its train in compliance with the aforesaid speed ordinance, particularly in view of the fact that the steam was shut off at 81st street and the locomotive was moving along smoothly and quietly, as testified by the engineer; and the jury might reasonably have found that the deceased saw the train approaching, but acting upon the assumption that it was proceeding in compliance with the city ordinance, concluded that he had ample time to cross the tracks in safety, and that in doing so plaintiff's intestate acted as an ordinarily prudent man would have under like circumstances.

In view of the fact that this train was approaching noiselessly and at a high rate of speed; that the planking in the passageway caused vehicles to create considerable noise in going through it; that because trains were already being operated over the elevated tracks and there were no gates at the two remaining grade tracks, which circumstances might lead the ordinary traveler to believe that the entire trackage had already been elevated, - we think the verdict is amply sustained by the evidence. Schnaeeweiss v. I. C. R. R. Co., 196 Ill. App. 248.

Counsel for defendants also complain that the trial court abused its discretion in refusing to hold the case open or to permit it to be reopened afterwards to receive testimony of a belated witness on defendants' behalf. No motion was made

locomotive of the said train when it approached the crossing, and that the plaintiff was not in a proper position to warn plaintiff's locomotive as he approached the said grade crossing.

That the plaintiff's locomotive was at a considerable distance south of the crossing when he merged from under the trestle, yet such fact would not be a recovery here. He had a right to rely upon the fact that defendant would operate the train in compliance with the standard speed ordinance, particularly in view of the fact that the steam was shut off at that point and the locomotive was moving along slowly and quietly, as

indicated by the engineer; and the jury might reasonably have found that the locomotive was the train approaching, and acting upon the assumption that it was proceeding in compliance with the city ordinance, concluded that he had ample time to cross the tracks in safety, and that in doing so plaintiff's locomotive acted as an obstructing power and would have under the circumstances.

In view of the fact that this train was approaching plaintiff's and at a high rate of speed; that the plaintiff's locomotive caused vehicles to create considerable noise in going through it; that because trains were already being operated over the elevated tracks and there were no gates or the two remaining open tracks, which circumstances might lead the ordinary traveler to believe that the entire crossing had already been elevated, - we think the verdict is amply sustained by the evidence. Comptroller v. L. E. & N. R. Co. 104 Ill. App.

121. Counsel for defendant also complains that the trial court refused the admission in refusing to hold the case open in so far as it is to be regarded as necessary to resolve controversy of a debated nature on defendant's behalf. No action was made

for a continuance when the cause was reached for trial and no showing was made why the testimony of this witness who then resided just outside the State could not have been produced in time or his deposition taken before the trial, and hence in our opinion the court did not abuse its discretion in refusing to delay or re-open the case to receive the offered testimony.

Finally it is contended that a new trial should have been granted on the grounds of newly discovered evidence. The evidence relied upon was with respect to deceased's alleged connection with a certain automobile accident which took place some time before his death. The nature of the said accident does not appear from the affidavits submitted, nor was it shown that the accident was due to any carelessness on the part of plaintiff's intestate, or that the witnesses thereto, if there were any, could be produced on the trial below. Furthermore, we are of the opinion that such evidence would have been immaterial because of the fact that there were eye-witnesses to the accident here before us.

From a careful examination of the record, we are of the opinion that the judgment must be affirmed.

AFFIRMED.

let a circumstance when the facts are reported for trial and an

appeal was made by the defendant of this witness who had

testified that outside the house could not have been produced in

view of his position taken before the trial, and hence in view

of the fact that the witness is returning to

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IDA ZUCKERMAN,
Appellee,

vs.

MORRIS JACOBSON,
Appellant.

213 I.A. 649

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD

DELIVERED THE OPINION OF THE COURT.

Appellee (plaintiff below) brought an action of forcible entry and detainer against the defendant, her son in law, and recovered judgment for the possession of the premises in question, from which this appeal has been prosecuted.

It appears from the evidence that at the time of the marriage of the defendant to plaintiff's daughter, defendant and his wife moved into an apartment owned by plaintiff, the latter stating that they might occupy same rent free for the period of one year; that after the expiration of the said year, although some discussion was had regarding the payment of rent for the use of the said apartment thereafter, no agreement was entered into, and the defendant and his wife continued to occupy the said apartment until suit for possession was instituted nine months later, with the result aforesaid. It further appears from the evidence that during the aforesaid time the defendant either borrowed from the plaintiff or plaintiff paid on his account, sums of money aggregating upwards of \$7,000.00.

It is insisted by defendant that because the plaintiff had agreed that he should occupy the said apartment rent free for one year, and that at the expiration thereof no new contract was entered into between them, he thereby became a hold-over tenant for another year upon the same terms and conditions, viz., rent free. Without considering the effect of the statute

STATE OF TEXAS

County of _____

IN SENATE

January 1, 1900

REPORT OF THE

COMMISSIONER OF THE GENERAL LAND OFFICE

FOR THE YEAR 1899

AND THE PROCEEDINGS OF THE COMMISSIONERS

IN THE YEAR 1899

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of frauds upon this unwritten agreement, it is sufficient to say that it clearly appears that under the aforesaid arrangement defendant was a tenant by suffrance only. Such tenancy is terminable by demand for possession, without any formal previous notice to quit. Dunne v. Trustees of School, 39 Ill. 578.

Other points have been raised and argued, which, in our opinion, do not merit discussion, save to say that they are not of sufficient moment to warrant disturbing the judgment.

From a careful examination of the record, we are of the opinion that the court properly entered judgment for the plaintiff; accordingly it will be affirmed.

AFFIRMED.

of Texas was also mentioned in the following to say
that it clearly appears that such an agreement was made in
1901 and is based on the following facts, which are
also in accord with the evidence, which was taken before
the court in the case of *United States v. Texas*, 100 F. 2d 100.
The court in that case said that the evidence was such
that it clearly appeared that such an agreement was made
in 1901 and is based on the following facts, which are
also in accord with the evidence, which was taken before
the court in the case of *United States v. Texas*, 100 F. 2d 100.
The court in that case said that the evidence was such
that it clearly appeared that such an agreement was made
in 1901 and is based on the following facts, which are
also in accord with the evidence, which was taken before
the court in the case of *United States v. Texas*, 100 F. 2d 100.

WITNESSES

Subscribed and sworn to before me this 10th day of May, 1901.

Notary Public for the State of Texas.

My commission expires the 10th day of May, 1902.

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213 I.A. 649

CITY OF CHICAGO,
Defendant in Error,

ERROR TO

vs.

MUNICIPAL COURT
OF CHICAGO.

CHARLES E. KELLOGG,
Plaintiff in Error.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, a hotel keeper residing in the city of Chicago, was found guilty by a jury, of a violation of sec. 2019 of the Revised Municipal Code of Chicago, which prohibits the keeping of a disorderly house, and fined \$50.00 and costs; to reverse the judgment entered thereon, this writ of error has been prosecuted.

But two questions are here presented for review; (1), does the evidence show a violation of the said section of the city ordinance, and (2), did the court err in refusing to grant a continuance of the cause?

From an examination of the record in this case, we are of the opinion that the verdict is sustained by the evidence, and that no useful purpose would be served by reciting in detail the facts upon which it was based.

When the cause was reached for trial, defendant was represented by two lawyers who entered a motion, supported by affidavit, on his behalf seeking a continuance because of the absence from the State of defendant's chief counsel. The court overruled said motion and the cause proceeded to a hearing, defendant being represented by the two attorneys referred to, who took charge of and conducted his defense. The issue in the case was simple and easily comprehended, and the defense could have been conducted by the average lawyer without extensive preparation.

2181 A 613

WITNESSES

Defendant in Error,

Plaintiff in Error.

THE COURT: The first witness called by the defendant is...

Plaintiff in Error, a female, residing in the city of Chicago, was found guilty of a violation of sec. 1 of the National Firearms Act of 1934, which prohibits the keeping of a dangerous weapon, and fined \$50.00 and costs; to wit: the defendant's handgun, this writ of error has been granted.

Two questions are now presented for review: (1),

that the evidence shows a violation of the said section of the said act, and (2), did the court err in refusing to grant a writ of error?

From an examination of the record in this case, we are of the opinion that the verdict is sustained by the evidence, and that no material purpose would be served by granting a writ of error which is now denied.

When the case was reached for trial, defendant was

represented by two lawyers who entered a motion, supported by affidavits, on the basis of defendant's prior record. The court

granted from the basis of defendant's prior record. The court

overruled said motion and the case proceeded to a hearing.

Defendant being represented by the two attorneys retained by him took charge of and conducted his defense. The issue in the case was simple and easily comprehended, and the defense could have

been conducted by the average lawyer without extensive preparation.

Under the circumstances we do not feel that the trial court abused its discretion in denying defendant's said motion.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

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127 - 24046

HATTIE AHLANDER,
Appellee,

vs.

HILBOR AHLANDER,
Appellant.

213 I.A. 649

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a decree of divorce in favor of complainant, in which the latter was allowed solicitors fees, alimony and certain other expenses.

The bill of complaint alleged and the decree found, that defendant was guilty of extreme and repeated cruelty toward complainant. Two specific acts of cruelty were alleged in the bill and found by the decree. The other acts of cruelty complained of and found by the decree consisted of alleged attempts on the part of defendant to compel complainant to submit to unnatural acts of sexual intercourse.

From an examination of the record we are of the opinion that the two specific acts of cruelty hereinabove referred to were established by the evidence and were of sufficient gravity to warrant the chancellor in granting the relief sought.

As to the alleged attempts to commit unnatural intercourse, we find that the complainant failed to establish same by a preponderance of the evidence, as required by law, and that the chancellor erred in finding the defendant guilty thereof.

The further point is made that the amount of alimony awarded (\$7.00 per week) is excessive, because complainant was earning \$20.00 per week, which, together with her alimony aggregated more than defendant's weekly wages; and that the court erred in ordering defendant to pay as additional alimony certain medical expenditures necessarily incurred by complainant because of an

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operation which she was obliged to undergo after her marriage and prior to the time of the trial.

These matters were all within the sound discretion of the chancellor, and in view of the showing made by the complainant, which was not contested by the defendant, we see no good reason for holding that the discretion has been abused. Benham v. Benham, 208 Ill. 98.

There being no error in the record justifying a reversal, the decree will be affirmed.

AFFIRMED.

Specimen taken and analyzed in laboratory of the Bureau and
found to be of the same kind.

These specimens were all found in the same place
and in the same way, and in fact the same place of the same
kind, and all analyzed by the Bureau, and found to be of the
same kind.

Specimen taken and analyzed in laboratory of the Bureau and
found to be of the same kind.

These specimens were all found in the same place
and in the same way, and in fact the same place of the same
kind, and all analyzed by the Bureau, and found to be of the
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24386

YETTA MILLER,
Appellee,

vs.

DAVID L. GOLDEN et al.,

On Appeal of NEVERLY A.
CLARK,
Appellant.

213 I.A. 649

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse an order appointing a receiver in a foreclosure proceeding on a trust deed.

In the said trust deed, which was attached to and made a part of the bill of complaint, the grantor conveyed as security for the payment of the debt therein described, certain real estate in Chicago, with the improvements thereon, together with all the rents, issues and profits of said premises; and waived all right to the possession of or income therefrom, pending foreclosure proceedings and until the period of redemption from any sale thereof had expired; and agreed that upon the filing of any bill to foreclose the said trust deed a receiver should at once be appointed to take possession or charge of the said premises, to collect the income therefrom, and such income, less receivership expenditures, including repairs, insurance premiums, taxes, assessments and receiver's commissions, should be paid to the person entitled to a deed under the certificate of sale, or in reduction of the redemption money if the premises were redeemed.

The order appealed from directed, among other things, that the receiver take charge of the premises and collect the rents accruing therefrom; that he keep the building insured

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James A. McLaughlin, Secretary of the Board of Directors

against loss by fire, pay all taxes assessed against said premises, make necessary repairs, etc.; and that all moneys received by said receiver over and above the outlays therein directed, be retained by him subject to the further order of the court.

The bill of complaint recited, inter alia, that the mortgaged premises were situate in a poor locality; that they had been sold for taxes; that they were subject to another incumbrance of \$6,000.00, which was paramount to complainant's; and that the improvements thereon were old and out of repair.

It is insisted by defendants that the aforesaid provision in the trust deed authorizing the appointment of a receiver was inserted therein solely for the benefit of the person entitled to a deed under the certificate of sale, and that inasmuch as such person is not entitled to the rents, issues and profits of the premises during the period of redemption, the entire provision is void; and that no equitable grounds having been shown to warrant such action, the appointment was erroneous.

It will be noted that the foregoing provision with respect to the appointment of a receiver has a two-fold purpose, viz.; to preserve the security, making all necessary expenditures incident thereto, and to pay the surplus, if any, to the holder of the deed under the certificate of sale.

The person entitled to the deed under the certificate of sale has no right to the rents, issues and profits collected from the said premises during the redemption period, because he derives his title under the decree, and his rights are fixed by statute and not by the trust deed, which becomes merged in the decree (Standish v. Musgrove, 223 Ill. 500; Schaeppi v.

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Bartholomae, 217 Ill. 105.) This fact affects the disposition of only the surplus funds remaining in the receiver's hands after payment of all necessary expenditures, but does not impair the validity of the provision for the appointment of a receiver for the purpose of preserving the security where, as in the case at bar, the trust deed expressly pledges such rents, issues and profits for the payment of the debt. Wright et al. v. Matters et al., 204 Ill. App. 398.

In our opinion, the allegations contained in complainant's verified bill of complaint, together with the proof made by her thereunder, were sufficient to warrant the court in appointing a receiver under the terms of the trust deed authorizing such action. Bagley v. Illinois Trust & Savings Bank, 199 Ill. 76.

It is further urged that the court erred in denying defendants' motion for leave to file a bond in lieu of the appointment of a receiver. While under the statute such procedure is authorized, it is not mandatory, but rests in the sound discretion of the court. In view of the circumstances shown by the record herein, we cannot say that the court abused its discretion in denying defendants' said motion.

Other points have been raised by defendants, which, however, we shall not pass upon as in our opinion they are not of sufficient moment to warrant us in disturbing the order appealed from. Accordingly it will be affirmed.

AFFIRMED.

24386

YETTA MILLER,
Appellee,

vs.

DAVID L. GOLDEN et al.
On Appeal of Beverly
A. Clark,
Appellant.

2204
213 I.A. 649

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

ADDITIONAL OPINION FILED ON PETITION FOR REHEARING.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

In addition to the points already passed upon in the original opinion filed by this court, our attention is again directed to the fact that complainant did not file her bond until seven days after the order of appointment of the receiver was entered, and it is contended, that this was not a compliance with the statute which requires that a bond be filed by the complainant before such receiver is appointed (Sec. 53, Chancery Act, Ch. 22, Hurd's B. S. for 1915-1916).

The order in question provided in part as follows:

* * * "That a receiver should be appointed for the said premises to take charge thereof upon the complainant, Yetta Miller, filing a bond with good and sufficient sureties to be approved by this court.
* * *

"It is further ordered, adjudged and decreed by the court that the Chicago Title and Trust Company be and it is hereby appointed receiver to take charge of the real estate and premises hereinabove described, to collect all the rents, issues and profits thereof, on filing its bond as receiver in the sum of \$2,000.00, to be approved by the court."

So far as the form of this order is concerned, we are of the opinion that it substantially conforms to the foregoing provisions of the statute, the second paragraph

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has been sold to the city and is now a part of the city's
property.

"It is further ordered, adjudged and decreed, that the writs of Habeas Corpus be and it is hereby agitated together to take charge of the same estate and premises hereinafore described, to appear all the said, James and William thereon, on filing the same as aforesaid in the sum of \$3,000.00, to be recovered by the court."

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Forgoing provisions of the statute, the second paragraph

of said order above quoted which purported to appoint the receiver being limited by the portion preceding it which required complainant to file a bond as a condition precedent to such appointment. Hence, as we construe this order, the appointment did not become effective until the complainant had filed her bond in compliance with the requirements thereof. Nor does the record show that the receiver entered upon his duties until after the complainant's bond was approved. In our opinion, therefore, the appointment of said receiver was substantially in accordance with the provisions of the statute.

We see no reason for departing from the conclusion herein reached, and accordingly a rehearing will be denied.

REHEARING DENIED.

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24386

YETTA MILLER,
Appellee,

vs.

DAVID L. GOLDEN et al.
On Appeal of Beverly
A. Clark,
Appellant.

213 I.A. 649

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

ADDITIONAL OPINION FILED ON PETITION FOR REHEARING.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

In addition to the points already passed upon in the original opinion filed by this court, our attention is again directed to the fact that complainant did not file her bond until seven days after the order of appointment of the receiver was entered, and it is contended, that this was not a compliance with the statute which requires that a bond be filed by the complainant before such receiver is appointed (Sec. 53, Chancery Act, Ch. 22, Hurd's R. S. for 1915-1916).

The order in question provided in part as follows:

* * * "That a receiver should be appointed for the said premises to take charge thereof upon the complainant, Yetta Miller, filing a bond with good and sufficient sureties to be approved by this court.
* * *

"It is further ordered, adjudged and decreed by the court that the Chicago Title and Trust Company be and it is hereby appointed receiver to take charge of the real estate and premises hereinabove described, to collect all the rents, issues and profits thereof, on filing its bond as receiver in the sum of \$2,000.00, to be approved by the court."

So far as the form of this order is concerned, we are of the opinion that it substantially conforms to the foregoing provisions of the statute, the second paragraph

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1. The first of the reasons I have mentioned is that the Commission is not a body of experts. It is a body of laymen, and it is not possible for a body of laymen to make a proper selection of experts. The Commission is not a body of experts, and it is not possible for a body of laymen to make a proper selection of experts.

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For as the type of this order is concerned, we are of the opinion that it substantially conforms to the foregoing provisions of the statute, and secondly, that

of said order above quoted which purported to appoint the receiver being limited by the portion preceding it which required complainant to file a bond as a condition precedent to such appointment. Hence, as we construe this order, the appointment did not become effective until the complainant had filed her bond in compliance with the requirements thereof. Nor does the record show that the receiver entered upon his duties until after the complainant's bond was approved. In our opinion, therefore, the appointment of said receiver was substantially in accordance with the provisions of the statute.

We see no reason for departing from the conclusion herein reached, and accordingly a rehearing will be denied.

REHEARING DENIED.

24436

S. PUGLISI and O. C. HEATY,
Appellants,

vs.

ALESSANDRO CONFORTI and
MARGARITA CONFORTI,
Appellees.

213 I.A. 649

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainants from an order dissolving a temporary injunction.

The bill of complaint, which was filed May 15, 1918, set forth in substance that complainants on April 8, 1918, entered into a written contract with defendants by the terms of which complainants purchased from defendants a certain manufacturing business, together with the good will thereof and certain property and assets therein described, a copy of which contract was attached to and made a part of the bill of complaint; that in conformity with the provisions of the said contract, complainants paid to defendants the sum of \$200.00 at the time of its execution, whereupon defendants turned over the aforesaid property and surrendered possession of the premises therein described, the title to which was to remain in the defendants until the full contract price therefor was paid; that on April 8, complainant made a further payment of \$300.00; that in and by the said contract, defendants made representations as to the value of the assets of the said business and the amount of its liabilities; that upon investigation it was found that said assets and the value thereof were considerably less than represented, while the amount of the liabilities was greatly in excess of representations in the contract; that the defendants, after having turned over the said property and premises to complainants,

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interfered with the business in various ways therein set forth. The bill then prayed for an accounting, and asked that defendants be restrained from in any way interfering with complainants in the conduct of the said business or from entering upon the said premises.

On May 17, 1918, on motion of the solicitors for the complainants, a temporary injunction was issued as prayed for in the bill of complaint; and on a hearing on motion of the defendants, the said injunction was subsequently dissolved.

The only question here presented for determination is, whether the allegations in the bill of complaint were sufficient to warrant granting the relief prayed for.

While the bill alleged misrepresentation on the part of the defendants in the manner aforesaid, yet it is devoid of any averments showing that defendants either knowingly or fraudulently made such representations or that the complainants relied thereon or were thereby induced to enter into the said contract, in the absence of which the bill failed to state grounds for relief in this respect. Nor would the mere recital that injury would follow if the relief prayed for were not granted be sufficient. That was but the conclusion of the pleader, unsupported by any facts set forth therein upon which such conclusion could be based. And although the bill recited that the financial condition of defendants was so involved that a judgment for damages against them would be uncollectible, it is clear from other recitals contained therein, that under the terms of the said contract the complainants are indebted to the defendants. Furthermore, by the terms of the said contract \$200.00 was to be paid at the time of its execution, \$1800.00 on or before April 16, \$3000.00 on or before April 26, \$5000.00 on or before May 6, and \$1000.00 on or before ninety days from its date. Therefore, when the bill of complaint was filed (May 10) there was due from complainants to defendants the sum of \$10,000.00, under the provisions of the contract, but \$500.00

interest with the business in various ways through out time. The bill then passed for an accounting, and asked that defendant be restricted from in any way interfering with complainant in the conduct of the said business or from entering upon the said premises.

On May 17, 1936, an action of the said business for the enforcement of a temporary injunction was issued on proper law in the bill of complaint, and on a hearing on notice of the defendant, the said injunction was subsequently dissolved. The bill was then amended for enforcement of the injunction. In answer to the allegations in the bill of complaint were returned in return granting the relief prayed for.

While the bill alleged that defendant on the part of the defendant in the manner of the bill, yet it is devoid of any evidence to show that defendant either knowingly or fraudulently and with representations as that the complainant called thereon on were thereby induced to enter into the said contract, in the absence of which the bill failed to state grounds for relief in this respect. Nor will the mere recital that injury would follow if the relief prayed for were not granted be sufficient. That was not the basis of the plea, unsupported by any facts not forth therein which such conclusion could be reached. And although the bill recited that the financial condition of defendant was so involved that a judgment for damages against them would be uncollectible, it is clear from other recitals contained therein, that under the terms of the said contract the complainant was bound to pay the defendant, by the terms of the said contract \$200.00 was to be paid at the time of the execution, \$100.00 on or before April 15, 1936, \$100.00 on or before May 1, and \$100.00 on or before May 15, 1936. Therefore, when the bill of complaint was filed (May 1936) there was due from defendant to complainant the sum of \$100.00, under the provisions of the contract, but \$200.00.

10) There was due from defendant to complainant the sum of \$100.00, under the provisions of the contract, but \$200.00.

of which had been paid. No further payments are recited in the bill of complaint nor is any excuse set forth for complainants' failure to make them nor any offer made by complainants to set them off against the damages alleged to have been sustained by them as a result of the breach of contract on the part of the defendants as aforesaid. Complainants are therefore seeking to compel the performance of a contract which they themselves have breached. In such a situation they were clearly not entitled to the relief sought. Chicago Washed Coal Co. v. Whitsett, 278 Ill. 623.

We conclude, therefore, that the court properly dissolved the injunction in question, and the order of dissolution is affirmed.

AFFIRMED.

of which had been held. The finding regarding the matter in the
fact of complaint was in any event not found for consideration
because it was not the first made by complainant to the
fact of finding the same alleged to have been received by
there is a record of the receipt of complaint on the part of the
department as a whole. Complainant's are therefore entitled to
know the progress of a complaint which they themselves have
presented. In such a situation they were clearly not entitled to

the matter of the complaint. See also, 100-100000-100000

It is, therefore, the duty of the agency to properly
investigate the complaint in question and the result of
the investigation is to be made known to the complainant.
The agency is to be held responsible for the result of the
investigation and the result of the investigation is to be made
known to the complainant.

436 - 23781

ELBRIDGE HANEY, Appellee,

vs.

BENJAMIN E. PAGE, Appellant.

213 I.A. 650

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case was before this court on a former appeal, Haney v. Page, 202 Ill. App. 271. A judgment in favor of appellee was there reversed and the cause remanded for errors of the court in excluding evidence offered by the defendant and in refusing instructions requested by him. The present appeal is from a judgment for plaintiff upon the finding of the court.

The plaintiff's claim is based upon his assertion of ownership by written assignment from one Francis G. Porter of the proceeds of 100 shares of the preferred stock of the Cities Service Corporation. The assignment is dated August 1, 1913, and states that the stock is "evidenced by a certificate now in the possession of Benjamin E. Page of Highland Park, Cook County, Illinois, for the purpose of having the same transferred to the purchaser of said stock, and to pay the proceeds over to the undersigned or his order."

It appears from the evidence that on July 22, 1913, prior to the assignment, Porter delivered the certificate of stock to defendant Page as security for a loan of \$3500.00. With Porter's consent Page pledged the stock to the Colonial Trust & Savings Bank for a loan of \$3500.00 to Page for which Page executed and delivered to the bank his personal note (less discount) due in thirty days. The proceeds of this loan, less \$1000.00 due from Porter to Page on a prior loan of \$2200.00 for three days, was turned over to Porter who executed and delivered

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to Page his note for \$3500.00 due in thirty days. A day or two after July 22nd, Porter informed Page that he had sold the stock. At Porter's request Page took the certificate to the office of Lester, Carter & Company, brokers who handed Porter a check for the price which was \$7000, less commissions. The check was made out to Smart, Porter & Company, a brokerage firm of which Porter was a member. Porter requested a personal check to his own order. This was refused unless the stock should be first transferred to Page for the reason that it would violate the rules of the Stock Exchange, the certificate being endorsed in blank. Page took the stock back to the bank whence he had taken it on a trust receipt. Later, at the request of Porter, Page caused the bank to send the certificate to New York for transfer to Page's name in order that payment for it might be made to Porter personally.

On August 2nd, Porter and Page played tennis together at the Exmoor Club and Page testifies that Porter said to him that he, Porter, needed the money and asked him for an additional loan of \$2500.00 upon the stock until it should come back in a day or two. Page testifies that he replied he was expecting some money in on the following Monday and if it came he would accomodate Porter; that the money came on Monday, August 4th; that he called Porter on the 'phone and told him that he would accommodate him with a loan of \$2500.00 on the stock for a few days and that on the same day he drew his check for \$2500.00 and delivered it to Porter who cashed it at the Harris Trust & Savings Bank on the following day. Page took no note for the additional loan of \$2500.00. He explains that the stock was expected from New York each day when he would get the money back from the proceeds of the stock.

On August 7th, Page telephoned Porter that the stock was returned, met him at the office of Lester, Carter & Company in the Rookery where Porter received a check for \$6991.25 to his order which he endorsed and delivered to page. Thereupon Page drew his own check on the State Bank of Chicago to the order of

to have his name for \$2500.00 on the thirty day. A day or two after that time, Porter informed Page that he had sold the stock. At Porter's request Page took the certificate to the office of Porter, Porter & Company, brokers who handed Porter a check for the price which was \$2500.00, less commissions. The check was made out to Porter, Porter & Company, a partnership firm of which Porter was a partner. Porter deposited a personal check to his own order. This was retained until the check should be first presented to Page for the reason that it would violate the rules of the board. Meanwhile, the certificate being endorsed in blank. Page took the check back to the bank where he had taken it on a loan receipt. Later, at the request of Porter, Page caused the bank to post the certificate to the York for transfer to Page's name in order that payment for it might be made to Porter personally.

On August 2nd, Porter and Page played tennis together at the summer club and Page testified that Porter said to him that he, Porter, would like money and asked him for an additional loan of \$2500.00. At that time the stock would it should have been in a day or two. Page testified that he replied he was expecting some money in on the following Monday and it is some he would accommodate Porter; that the money came on Monday, August 2nd; that he called Porter on the phone and told him that he would accommodate him with a loan of \$2500.00 on the stock for a few days and that on the same day he drew his check for \$2500.00 and delivered it to Porter who cashed it at the New York Trust & Savings Bank on the following day. Page took no note for the additional loan of \$2500.00. He explained that the stock was expected from New York each day when he would get the money back from the proceeds of the stock.

On August 7th, Page telephoned Porter that the stock was returned, and him at the office of Porter, Porter & Company in the Rockway where Porter received a check for \$2500.00 to his order which he endorsed and delivered to Page. That upon Page drew his own check on the State Bank of Albany to the order of

Porter for \$991.25 in settlement of the transaction and delivered it to him. The check is endorsed by Porter and the plaintiff to whom it was delivered by Porter and to whom it was paid on the following day August 3th.

The issue in the case is one of fact. Did the defendant prior to loaning the \$2500.00 to Porter on August 4th, have notice or knowledge of the assignment of the stock by Porter to the plaintiff on August 1st? The plaintiff testifies that after the execution and delivery of the assignment on August 1st, he tried some three or four times to reach defendant by 'phone; that he finally reached him and told him specifically of the assignment of the stock and the terms thereof; that the defendant told him he would remit the proceeds to him; that he also informed defendant that he had written him about the assignment and that he in fact on that day had sent by mail such a notice. He thinks he prepared the notice himself, but is not sure whether it was in his handwriting or typewritten. He kept no copy of it. He had a stenographer in his office, but the stenographer was not produced as a witness.

He testifies in all to three conversations with defendant by 'phone between the first and eighth days of August in which the defendant was notified of plaintiff's rights in the stock, and in which the defendant acknowledged these rights and promised to remit the proceeds to plaintiff. On the other hand defendant denies absolutely these notices, conversations and promises and denies that prior to the close of the transaction he had any notice, either orally or in writing, or any knowledge of plaintiff's claim to the stock.

The plaintiff rests his case on his own testimony. Porter who testified for plaintiff on a former trial was not produced as a witness. He was in New York, but a stipulation was on file that his former testimony might be introduced. Neither party availed himself of it.

The vital point in the case is notice. This is

The first point in the case is notice. This is

Neither party waived himself of it.

was on this that his former testimony might be introduced.

produced as a witness. He was in New York, but a stipulation

Forster who testified for plaintiff as a former trial was not

The plaintiff would not come on his own testimony.

State is the issue.

either orally or in writing, or any knowledge of plaintiff's

that prior to the close of the transaction he had any notice,

plaintiff's notice, conversations and promises was denied

the promise to plaintiff. On the other hand defendant denies

what the defendant acknowledged those rights and promised to testify

defendant was notified of plaintiff's rights in the stock, and in

by 'phone between the first and eighth days of August in which the

he testified in all of these conversations with defendant.

and plaintiff as a witness.

11. He had a stenographer in his office, but the stenographer was

defendant. It was in the handwriting of defendant. He kept a copy of

a notice. He thinks he prepared the notice himself, but is not sure

the defendant and that he in fact on that day had seen it with

him. That he also informed defendant that he had written him about

defendant; that the defendant told him he would handle the proceeds for

himself. He testified that he had written him about the proceeds for

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himself. He testified that he had written him about the proceeds for

positively sworn to by plaintiff. It is positively denied by defendant. It would seem the trial court should have applied the doctrine laid down in Peaslee v. Glass, 61 Ill. 95. "There are very few cases in which a jury should find a verdict for the plaintiff upon his unsupported testimony alone when that testimony is positively contradicted by the defendant. It belongs to the plaintiff to make out a case. The burden of proof is upon him and where the issue rests upon the sworn affirmation of one party, and the sworn denial of the other, both having the same means of information and both unimpeached and testifying to a state of facts equally probable, a conscientious jury can only say that the plaintiff has failed to establish his claim." Are there facts in the record which show that this is one of the "very few cases" where that rule should not be applied? The plaintiff was for many years one of the judges of the Circuit Court of Cook County. He is now one of the prominent and successful members of the bar. The defendant was for some time a teacher of the public schools and later engaged in business. The reputation of both for truth and veracity is unimpeached. Both are interested to the same extent in the result of the suit. It is clear that one or the other of them is utterly mistaken as to the material facts about which they testify.

As to the probabilities, we are impressed with the force of appellant's argument that it is unreasonable to believe defendant would have advanced the \$2500.00 to Porter on August 4th if he had received notice as plaintiff testifies, or that he would have delivered the check for \$991.25 to Porter on August 7th if he had such notice. The record fails to show an adequate motive or reason for such conduct. Appellee suggests as a possible motive the friendship between Porter and the defendant and urges that the \$2500.00 loan was made without security and that when defendant later learned of Porter's failing circumstances, he decided in order to save himself, to claim that it was made upon the security of the stock. The evidence does not establish this

positively known to be plaintiff. It is positively denied by defendant. It would seem the trial court should have applied the doctrine laid down in Wong v. Shiao, 21 Cal. 2d 111, 128. "Where two parties come to a jury should take evidence for the plaintiff upon his unopposed testimony alone when that testimony is positively contradicted by the defendant. It belongs to the plaintiff to make out a case. The burden of proof is upon him and when the issue rests upon the sworn affirmation of one party, and the sworn denial of the other, both having the same means of information and both unopposed and testifying to a state of facts equally probable, a conscientious jury can only say that the plaintiff has failed to establish his claim." Are there facts in the case which show that this is one of the "very few cases" where such a rule would not be applied? The plaintiff was for many years one of the owners of the Blackie Court of Cook County. He is now one of the present and successful members of the bar. The defendant was for some time a lecturer of the public schools and later engaged in business. The reputation of both for truth and veracity is unimpaired. Both are interested to the same extent in the result of the suit. It is clear that one or the other of them is guilty of misstatement as to the material facts about which they testify. As to the probabilities, we are impressed with the force of appellant's argument that it is unreasonable to believe defendant would have advanced the \$2500.00 to Porter on August 24th if he had received notice as plaintiff testified, or that he would have delivered the check for \$2501.25 to Porter on August 24th if he had such notice. The record fails to show an adequate motive or reason for such conduct. Appellate suggests as a possible motive the friendship between Porter and the defendant and urges that the \$2500.00 loan was made without security and that some statement later issued by Porter's father's failing circumstances, he decided in order to save himself, to claim that it was made upon the security of the stock. The evidence does not establish this

theory. The supposed facts from which it might be implied are denied by Page, and Porter, the one witness by whom he might have been contradicted, was not called.

We are inclined to think the probabilities are with the defendant. On the other hand, the trial court saw the witnesses and the finding of the trial court is entitled to the same respect here as the verdict of a jury.

The trial court has preserved in the record its reasons for holding that the plaintiff had established his case by a preponderance of the evidence. It appears from an examination of the opinion of the trial judge that he misunderstood a very important part of defendant's evidence. He says: "Defendant on cross examination was asked a question by plaintiff's attorney, to which he replied (speaking of his talk with Porter at the Exmoor Club): I don't recollect if Porter told me that he had transferred the stock to Hanecy. That answer, given as it was, indicated to the court that he knew something of plaintiff's claim to the stock in dispute." This would have been important if true, and if defendant so testified the finding of the trial court against him might possibly be justified. As a matter of fact upon an examination of the record we find that the defendant at the time the supposed answer was given was testifying as to his recollection of what Porter said on a former trial of the case, not to defendant's conversation with Porter at the Exmoor Club.

This misunderstanding of the evidence on the part of the trial court was serious. It makes it impossible for this court to give to the finding of the trial court the weight to which it would otherwise be entitled. Upon an examination of the whole record we are not satisfied that the plaintiff established his case by a preponderance of the evidence, and the judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

467 - 23812

L. C. H. E. ZEIGLER;

Appellee.

vs.

FREDERICK W. GETTY.

Appellant.

213 I.A. 650

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant upon covenants in a lease whereby it was provided that the lessor should supply appellee with sufficient hot water upon the demised premises. If the plant through which it was supplied became inadequate, the lessor agreed he would install another. Appellant was the assignee of the lessor and assumed the covenants.

The trial was by the court without a jury and the finding was for the plaintiff in the sum of \$39.60 upon which judgment was entered. Appellant submitted no propositions of law to be "held" or "refused". The only questions, therefore, before us for review are alleged errors as to the admission of evidence and the sufficiency of the evidence to sustain the findings and the judgment entered. Szczukowski v. Polska, 172 Ill. App. 192; Bredhoff et al. v. Leeman et al., 181 Ill. App. 247; Mutual Protective League v. McKee, 223 Ill. 364.

The evidence shows that appellant knew of and recognized the obligation imposed upon him by the lease with reference to this hot water; that both he and his grantor knew that appellee, who was a licensed physician, in connection with his practice regularly gave to his patients medicated baths in which hot water was an absolute necessity; that for several months prior to the beginning of this suit he failed to keep the covenants in the lease to furnish it and on one occasion recognized appellee's rights in the matter by paying damages for

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1. The first step in the process of the development of the program was the selection of the subject matter. The subject matter was selected on the basis of the following considerations:

...the only person who was not a member of the organization was the one who was not a member of the organization.

all the cases. I will get into more detail about that later.

in which hot water was an essential ingredient; that for several
with his practice regularly gave to his patients medicine both
know that applicant, who was a licensed physician, in connection

his default. The evidence amply sustains a finding for the plaintiff.

The damages claimed and allowed by the court were \$39.00 being loss from inability of the plaintiff through appellant's neglect to give baths to thirteen patients who were in plaintiff's office with requests therefor on the 23rd day of September, 1915. The testimony of plaintiff showed that these thirteen patients were present on that day and that he was compelled to turn them away on account of the lack of hot water, and that the usual and customary charge per patient for such services was \$3.00.

On cross examination plaintiff was asked to give the names of the said patients which he declined to do under claim of professional privilege, and the court on that ground apparently refused to compel the disclosure. Plaintiff testified that he had made a list of these patients for the reason that he was anticipating trouble. The names of the patients who applied for treatment were not in any sense privileged, and it was error for the court to so rule. While the extent of cross examination is very much in the discretion of the trial court, we think in this case the right of the defendant to have these names was so clear and important that the error must be considered reversible.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

his behalf. The evidence simply sustained a finding for the

plaintiff.

The defendant claimed and alleged that the plaintiff

was not being taken from the plaintiff's

business's records to give him to the plaintiff who was

in plaintiff's office with requests thereon on the 13th day of

September, 1915. The defendant at plaintiff's office that those

plaintiff's records were taken on that day and that he was

compelled to take them away on account of the lack of hot water,

and that the usual and customary charge per patient for such

services was \$5.00.

On cross examination plaintiff was asked to give the

names of the said patients who he claimed to be taken from

of professional privilege, and the court on that ground specifically

refused to compel the disclosure. Plaintiff testified that he

had made a list of those patients for the reason that he was

reluctant to provide. The names of the patients who applied for

treatment were not in any sense privileged, and it was error for

the court to so rule. While the extent of cross examination is very

small in the disclosure of the trial court, we think in this case

the right of the defendant to have those names was so clear and

important that the error must be considered reversible.

The judgment will be reversed and the cause remanded.

REVEREND AND HONORABLE.

C. H. FELLOWS,
Appellee,

vs.

FIDELITY AND CASUALTY
COMPANY, a New York
Corperation,
Appellant.

213 I.A. 650

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant was sued upon a policy issued by it whereby it agreed to indemnify appellee for the loss of property by robbery through actual force and violence from the person while such property was actually worn or carried on the person of the assured, and the assured was actually cognizant and conscious of the robbery.

The declaration alleged that appellee was so robbed on October 27, 1914, and that there was then taken from him a three stoned diamond ring, a diamond sapphire cluster scarf pin, a diamond locket with three diamonds, and a purse containing \$20.66 in cash and a check.

The policy provided that loss thereunder should be payable immediately upon submission of satisfactory proof and that the company should not be liable in excess of the actual cash value of the property at the time it was lost.

To the declaration defendant filed a plea of nonassumpsit and a further plea denying that plaintiff was robbed by actual force and violence at the time alleged. The case was tried by a jury which returned a verdict for the plaintiff for \$1925.00 on which the court entered judgment.

The plaintiff testified to facts showing the alleged robbery and while appellant argues that the evidence is improbable,

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the credibility of plaintiff and the weight of his evidence was the for jury. The evidence is uncontradicted. We cannot on the record hold the verdict contrary to the weight of it.

The dealers from whom the diamonds in question were purchased by plaintiff testified with reference to the sale of the same in Chicago and to the purchase price paid therefor at the time of the purchase thereof. They also testified to the cash market value thereof in Chicago at the time of the alleged robbery. They appear to have been well qualified as experts and their evidence is also uncontradicted. The original cost of the diamonds was \$1305.00. The evidence indicated a total valuation at the time of the robbery of \$1703.75.

Appellant complains because evidence of the price paid for the diamonds was received and because the court by the sixth instruction asked by plaintiff told the jury that the price paid for them might be considered in determining the cash market value of the property at the time and place it was taken if the jury found it was so taken. We think the evidence was properly received and there was no error in the instruction.

Appellant also complains because the court refused, as requested by appellant, to instruct the jury that the market value of the property was not what it would sell for under "special or extraordinary circumstances." As there was no evidence of sales under such special or extraordinary circumstances, we do not think the refusal to so instruct was error. Defendant's second refused instruction on which error is urged was argumentative and the subject matter of it covered by other instructions. It was properly refused. However, by the fifth instruction the court erroneously, we think, instructed the jury that if they should find for the plaintiff on the robbery, the measure of damages "is the cash market value of the property so taken at the time and place it was taken, together with five percent interest thereon from the date proof of loss was furnished by the plaintiff to the defendant."

the evidence in this case is not sufficient to establish the fact that the property was damaged by the fire. The evidence is inconclusive. The court in this case has held that the burden of proof is on the party who alleges that the property was damaged. In this case, the party who alleges that the property was damaged has failed to establish its case. The court has therefore found in favor of the party who denies that the property was damaged.

As the damages were unliquidated, the allowance of interest was error. Hurd's Revised Statutes, Chap. 74, sec. 2; Harvey v. Hamilton, 165 Ill. 377; Turnbull Joice Lumber Co. v. C. L. & Coal Co., 152 Ill. App. 347; Illinois Glass Co. v. Ozell Company, 197 Ill. App. 626; Higbie v. Rust, 211 Ill. 333; Steele Wedeles v. Sheedee Pond Packing Co., 153 Ill. App. 576; Proctor & Gamble v. Emerson, 191 Ill. App. 530.

As it is evident that the jury included interest in their verdict, the judgment will be reversed unless appellee remits the amount of such interest up to the verdict. If, therefore, appellee will remit the amount of said judgment in excess of \$1711.32 it will be affirmed, otherwise reversed and remanded.

AFFIRMED UPON REMITTITUR,
OTHERWISE REVERSED AND
REMANDED.

506 - 23851

MAC CATSOLOZ,
Appellee,

vs.

CHICAGO, BURLINGTON &
QUINCY RAILROAD COMPANY,
Appellant.

213 I.A. 650

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant, defendant below, alleging that while he was in its employ, defendant had negligently failed to furnish him a safe place to work, or sufficient help or proper tools and appliances, and had ordered him to do certain work in a negligent manner whereby without fault on his part, he was injured.

On July 12, 1915, plaintiff was working as a laborer for the defendant near Douglas, Wyoming, assisting in raising the tracks of defendant's railroad. While so employed he sustained a rupture into the scrotum through the inguinal canal and sues for this injury.

It appears from the evidence that in the course of his employment he and other laborers were directed by their foreman to pick up certain steel rails and carry them about 17 or 18 yards. The rails weighed about 500 pounds each. The ground was soft and it was necessary to carry them on an up-grade. Six men of whom plaintiff was one were carrying one of these rails at the time he received the injury. Plaintiff testifies (although the foreman in charge denies this) that when they began to carry the rail eight men were assisting; that after they had carried it some distance and before plaintiff was injured, the foreman took two of the men away to do some other work. Plaintiff further testifies, "After I got a few

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an exact reverse is observed

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

to answer this at least one

“**我愛我的家**”是“**家園**”的序曲，也是“**家園**”的序曲。

steps I feel that somebody pulls like a stick, a knife on my place there (indicating). I feel severe pain. I try all my effort to hold the rail, because in case I drop the rail I caught my feet and it smashes the toes."

Accepting plaintiff's version of the transaction as correct, we think the injury which plaintiff sustained was the result of a risk which he assumed as a part of his employment. It is true the rule of assumed risk does not usually apply in cases where the servant is injured while obeying the order of the master to do a particular thing, but where as here the order of the master calls for the use of physical strength of which the servant, rather than the master is the best judge, the doctrine of assumed risk applies. We cannot determine from this record what weight plaintiff was lifting at the time he was injured. If we assume that each of the six men assisting carried his full part, the burden upon each would be only 83-1/3 pounds. There is no evidence in the record tending to show that this was an unreasonable burden under the circumstances. The amount of energy used by the plaintiff depended entirely on his own volition. Even if it were made to appear that the master failed to furnish a sufficient supply of help, this would not render the defendant liable where as here plaintiff had knowledge thereof and continued to work with such knowledge. Swift & Co. v. Rutkowsky, 167 Ill. 156. We think plaintiff's injury was the result of a risk which he assumed as a part of his contract of employment. Cumberland Pipe Line Co. v. Strong, 194 S. W. Ky. 1036.

The judgment will be reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

23851

FINDINGS OF FACT.

We find as facts that the plaintiff in this case sustained the injuries sued for by carrying with other servants of defendant a steel rail; that the strength exerted depended wholly on plaintiff's own volition and that knowledge of what he could with safety lift was with the plaintiff rather than defendant; that plaintiff therefore assumed the risk of the injury sued for.

The first of these is the fact that the
 Government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.
 The second is the fact that the
 Government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

535 - 23880

213 I.A. 651

MARYLAND CASUALTY COMPANY,
Appellee.

vs.

GARDEN CITY SAND COMPANY,
a corporation,
Appellant.

APPEAL FROM JUDICIAL COURT
OF CHICAGO.

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

Appellant, Garden City Sand Company, is a corporation which is by its charter empowered to "purchase, lease and operate real estate and interests therein, in the States of Indiana, Illinois and Wisconsin, for the procurement, sale and disposal of gravel, sand, stone and other building material," etc. It is sued upon its contract to indemnify and hold harmless appellee against liability by reason of the execution and delivery of an appeal bond executed by appellee at the request of appellant as surety for one William Sullivan, who appealed from a decree of the Superior Court of Cook County. Prior to the execution of this bond Sullivan assigned to appellant all his interest in the suit then pending in the Superior Court.

Sullivan was a member of the partnership of Morrison & Co. and O'Brien. Its business was constructing sidewalks. In the business it needed and used the products of appellant. It purchased these, but failed to pay for them and judgment was obtained against the partnership by the Sand Company for the amount due. Apparently the collection of this judgment depended upon the reversal of the decree appealed from, which held adversely to Sullivan's claim that certain warrants of the city of Berwyn were assets of the copartnership. The regular salaried attorney of the sand company entered his appearance and conducted the litigation in Sullivan's name in the trial, and also in the Appellate and Supreme Courts. The decree was affirmed and appellee compelled to pay the

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costs taxed against Sullivan.

Appellant when sued contended in the trial court and claims here that the execution and delivery of the contract of indemnity was ultra vires the corporation and therefore void under the rule laid down in Central Transportation Co. v Pullman Palace Car Co., 139 U. S. 24; National Home Building Association v. Home Savings Bank et al., 181 Ill. 35, and the well known line of cases following these decisions. The plea of ultra vires is not one that is generally favored. The courts of this State recognize two classes of ultra vires contracts - First, those wholly without the object for which the corporation was created, or wholly without the powers conferred upon the corporation by the legislature; Second, those which constitute an abuse of the object for which the corporation was created, or an abuse of the powers conferred. The first class are absolutely void. No action can be maintained upon them, nor can they be indirectly enforced by the application of the principles of estoppel. In the second class the corporation may not while retaining the benefits of the contract successfully plead that it was beyond its powers to execute it. The principles of estoppel apply. The State alone can attack the contract. Lurton v. Jacksonville Loan Association, 187 Ill. 141; Illinois Life Insurance Co. v. Reifeld, 184 Ill. App. 582.

With the express powers conferred upon a corporation, all powers which are reasonably necessary in order that the express powers granted may be carried out are granted by implication. Among such powers of necessity is that of collecting debts which may become due to the corporation in the course of the business in which it is engaged. Lloyd & Co. v. Matthews, 119 Ill. App. 546. "In exercising powers conferred by its charter a corporation may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a

separate, unauthorized business." Best Brewing Co. v. Klaseen, 185 Ill. 37; Kraft v. The West Side Brewery Company, 219 Ill. 205.

The execution of the agreement upon which plaintiff sues was, under the circumstances here in evidence, neither wholly without the powers granted to the corporation by the legislature, nor wholly foreign to the object for which it was created by it. It was therefore not void, nor, we think, was it an abuse of any power conferred or object for which the corporation was created; but if it be conceded that it was, the corporation accepted and received the benefits accruing to it under the contract and is now estopped when sued to set up a lack of authority to make it. Calumet etc. Dock Co. v. Conkling, 273 Ill. 318; Mercantile Trust Company v. Kaster, 273 Ill. 318.

The judgment of the trial court will be affirmed.

AFFIRMED.

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LIQUID CARBONIC COMPANY,
a corporation,
Plaintiff in Error,

vs.

HERMAN P. POLLATZ,
Defendant in Error.

213 I.A. 651

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT,

Plaintiff in error as plaintiff below brought an action in replevin against defendant in error for a team of horses, harness and wagon. The property was taken on the writ. The trial was by the court and the finding was that the right of property was in the plaintiff, subject to a lien for \$161.00 in the defendant, and it was ordered that plaintiff pay the defendant that sum within thirty days, in default of which a writ of retorno habendo should issue for the property replevied..

The plaintiff claimed title to the property under a chattel mortgage dated October 15, 1915, acknowledged, delivered and recorded December 2, 1915. The mortgage was to secure an indebtedness of \$689.00, represented by promissory notes, the last of which matured September 19, 1916. The mortgage is in the usual form with warranty of title free and clear of encumbrances etc. Prior to its maturity the time for payment was extended until May 10, 1917, in accordance with the provisions of the statute relating to the extension of chattel mortgages.

The evidence shows that on December 2, 1915, the property was being kept at the livery stable of the defendant, Pollatz. He did not have exclusive possession of it, or at

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least did not exercise exclusive control. The team and wagon were used by the mortgagors each day in their business and returned to the livery stable in the evening. The horses were fed and cared for by defendant up to the time they were replevied, March 17, 1917. In the meantime on two or three occasions the defendant refused to let the horses go out. The owners and mortgagors then gave notes for the sum due and the team was released. When the notes fell due they were not paid and defendant again refused to let the horses be taken out and claimed them again under his lien.

The rights of the defendant must be determined by Sec. 49, Chap. 82, Hurd's Revised Statutes. That section was construed in Charles v. Neigelsen, 15 Ill. App. 17, and it was there held that as to charges which accrued subsequently to the giving of the chattel mortgage without knowledge or consent of the mortgagee upon a contract to which the mortgagee was not privy, the lien of the stable keeper would be inferior to that of the mortgagee. This established construction of the statute seems to have been overlooked in the trial. The lien claimant made no attempt to prove what amount was due to him for feeding and caring for the horses at the time of the execution and delivery of the chattel mortgage to the plaintiff and the record does not disclose what that amount was. Defendant testifies that on October 15, 1916, \$225.00 was due; that on March 17, 1917, \$161.82 was due, and that three sets of notes were given, the first ones in November or December, 1915, aggregating \$170.00. Whether this \$170.00 accrued before or after the giving of the chattel mortgage does not appear. It is affirmatively shown that some payments were made thereafter which would presumably be applied thereon.

The plaintiff claimed upon the trial and urges here that the defendant waived his lien by taking notes for the amount due and by allowing the owners to take the horses out

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least did not examine exclusively. The fact and when

was that of the mortgage each day in their business and the

turned to the living claim in the evening. The horses were

fed and cared for by defendant up to the time they were registered,

March 27, 1917. In the morning on the 28 or thereabouts the

defendant refused to let the horses go out. The woman and

defendant then gave notice to the man and the man was

refused. When the man left the house and went to the

claimant to let the horses be taken out and claimed that

again under his line.

The rights of the defendant were to defendant by

the 27, 28, 29, 30, 31, 1917. That section was con-

cluded in *Smith v. Halsey*, 12 Ill. App. 4, and it was there

held that as to charges which accrued subsequently to the giving

of the chattel mortgage without knowledge or consent of the

mortgagee there was a contract to which the mortgagee was not party,

in the case of the whole matter would be inferior to that of the

defendant. This established construction of the statute seems to

have been evaded in the trial. The claimant made no

attempt to prove what amount was due to him for feeding and caring

for the horses at the time of the execution and delivery of the

chattel mortgage to the plaintiff and the record does not disclose

what that amount was. Defendant testifies that on October 26, 1916,

he paid to the man and that on March 14, 1917, \$261.92 was due, and that

some date of notes were given, the latter ones in November 22

1916, aggregating \$240.00. Whether this \$240.00 covered

notes or other the giving of the chattel mortgage does not appear.

It is affirmatively shown that some payments were made thereafter

which would presumably be applied thereon.

The plaintiff claimed upon the trial and urges here

that the defendant waived his lien by taking notes for the

amount due and by allowing the owner to take the horses out

and use them. In the absence of facts indicating that it was the intention of the parties, the taking of a note for the sum due would not discharge the lien unless the note by its terms would not mature until after the expiration of the lien. Van Conet v. Bushnell, 21 Ill. 634; Faddock v. Stout, 121 Ill. 571; Kendall v. Fader, 199 Ill. 294. But after taking notes the defendant could not maintain his lien therefor without producing the notes in court and showing that they had not been transferred to a third party. Clement v. Newton, 78 Ill. 427. The notes are not in evidence. Neither dates of maturity or ownership thereof appear. No offer was made to surrender them.

Irrespective, however, of every other question in the case, it was necessary for the lien claimant to show that the charges for which he was allowed a lien accrued prior to the execution and delivery of the mortgage, or in default thereof to prove that such charges were incurred with the knowledge and consent of the plaintiff. From the record before us neither is made to appear. Nor does it show facts putting plaintiff on notice as was the case in McClason v. Hennessy, 161 Ill. App, 387.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

and was then, in the absence of facts indicating that it was
the intention of the parties, the taking of a note for the sum
was not binding on the bank unless the note by the bank
was not made until after the expiration of the time, viz.
Bank v. Bannell, 111 Ill. 434; Bank v. Bannell, 111 Ill. 434;
Bank v. Bannell, 111 Ill. 434. But after taking notes the
bank is not bound to maintain his lien therefor without providing
the notes in court and showing that they had not been transferred
to a third party. Bank v. Bannell, 111 Ill. 434. The notes
are not in evidence. Neither date of maturity or ownership
is shown. No offer was made to surrender them.
Interrogative, however, of every other question in the
case it was necessary for the bank to show that the
notes were not allowed a lien secured prior to the
expiration and delivery of the notes, or in default thereof
to show that such charges were incurred with the knowledge and
consent of the plaintiff. From the record before me neither
is made to appear. Nor does it show those parties plaintiff?
as well as was the case in Bank v. Bannell, 111 Ill. 434.

The judgment will therefore be reversed and the case

reversed.

79 - 23991

E. Z. ZIFFERMAN,
Plaintiff in Error.

vs.

B. B. WILSON,
Defendant in Error.

213 I.A. 651

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error sued defendant in error upon a promissory note for the sum of \$105.40 dated February 2, 1914, due three years after date and payable to the order of plaintiff in error. The note stated upon its face that it was for value received.

The affidavit of merits in substance set up that the plaintiff was not the owner of the note and that the indebtedness represented by it had been transferred to a creditors' committee by the plaintiff. "That the title and control of the amount due at the time of making said written agreement was assigned to and is now under the legal control and in the hands of said committee and that the plaintiff has not the right to bring suit or to recover against the defendant any sum whatever from the defendant." The court found the issues for the defendant and entered judgment thereon.

The plaintiff introduced the note in evidence and the defendant put in evidence a written assignment dated July 22, 1913, by which the plaintiff in consideration of a like assignment by other creditors, transferred to trustees therein named all legal and equitable interest in his claim against the defendant with full power to use, collect, discharge etc. The agreement recited that whereas Wilson was indebted to the assignor in the sum of \$372.00 and to other persons in varying amounts, and had executed an assignment of all his property and assets to named

100.47918

10

Received 10 November 2004; accepted 12 January 2005

There is no more of a difference than there is between the two.

... ..

The Plaintiff introduced the note in evidence and the

by which the president is considered to be like a

trustees to hold in behalf of all creditors until such time as a composition agreement might be made and entered into between the debtor and creditors in consideration thereof said assignment was made.

Defendant in error argues that he was not on the date of the note indebted to the plaintiff in error and that there was, therefore, no consideration for the note. The note was signed in a meeting of this creditors' committee and was delivered to the creditors' committee and by that committee was turned over to the plaintiff as a part of the indebtedness due him. The prior indebtedness was ample consideration and the committee, if it saw fit, and defendant acquiesced had a right to take the note in the name of plaintiff in error. Defendant acquiesced and repeatedly promised to pay the note.

The finding of the court should have been for the plaintiff, and judgment should have been entered for the amount of the note with accrued interest from maturity. The judgment will be entered here.

REVERSED WITH JUDGMENT HERE.

23991

FINDING OF FACTS.

We find that the plaintiff is the owner and legal holder of the note sued upon; that he paid a good and valuable consideration therefor and that there is due to plaintiff in error from the defendant in error upon said note the sum of one hundred and fifteen dollars and thirty seven cents (\$115.37).

Page 2 has been sent to the [redacted] and [redacted] [redacted]

Whether you have a dog or a cat, you know your pet is a member of the family.

98 - 24014

STANDARD OIL COMPANY, an
Indiana corporation,
Appellee,

vs.

KEYSTONE OIL & MANUFACTURING
COMPANY, a corporation,
Appellant.

213 I.A. 651
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff below sued for damages sustained by reason of its truck being run into by a truck owned by defendant and which was at the time under the control of its servants.

The accident occurred December 1, 1915, in Chicago on Fullerton avenue, just west of the bridge there. Plaintiff's truck was being driven west in the west bound street car tracks at a speed of about ten or twelve miles an hour, and defendant's truck was being driven east in the east bound street car tracks at about the same speed. As the trucks approached each other, that of defendant suddenly turned across the street and without warning ran into that of plaintiff, causing damages which are stipulated to amount to \$362.44, for which sum upon a finding of the court judgment was entered.

Plaintiff's truck was at the time being driven by a licensed chauffeur. It is not claimed that he was in any way negligent. Defendant's chauffeur, apparently contrary to the orders of defendant, permitted a boy between 15 and 17 years of age to drive its truck, and he was so driving at the time it lurched across the street and struck the truck of plaintiff. The boy was not employed by defendant and had never driven a truck before. His management of it was palpably negligent. It was claimed on the trial that defendant was not liable because

2131A. 651

THE COURT IN THE MATTER OF THE ESTATE OF THE DECEASED
THE PLAINTIFF'S PETITION FOR THE RECOVERY OF THE
EQUITY OF THE ESTATE OF THE DECEASED AND THE
DEFENDANT'S ANSWER TO THE PETITION AND
COUNTERCLAIM AND THE COURT'S ORDER THEREON

The accident occurred November 1, 1915, in Chicago
on Madison Avenue, just west of the bridge where
plaintiff was being driven west in the west bound street car track
of a street of about ten or twelve miles an hour, and defendant's
truck was being driven east in the east bound street car track
at about the same speed. As the trucks approached each other,
that of defendant suddenly turned across the street and without
warning ran into that of plaintiff, causing damage which was
estimated to amount to \$500.00, for which sum upon a finding
of the court judgment was entered.

Plaintiff's truck was at the time being driven by a
licensed chauffeur. It is not claimed that he was in any way
negligent. Defendant's chauffeur, apparently contrary to the
orders of defendant, permitted a boy between 15 and 17 years
of age to drive the truck, and he was so driving at the time
it knocked across the street and across the track of plaintiff.
The boy was not employed by defendant and had never driven a
truck before. His management of it was palpably negligent. It
was claimed on the trial that defendant was not liable because

the defendant was not its servant and his control of the truck unauthorized. This view cannot prevail. Although defendant's chauffeur, contrary to defendant's orders, permitted the boy to drive the truck, as to third persons the boy was the servant of defendant, and defendant liable for his negligence. Booth v. Mister, 7 Carr. & P. 66; Andrews v. Boedecker, 126 Ill. 605; 27 Ill. App. 30; Prince v. Taylor, 171 S. W. 826.

Appellant argues that there is no proof that the boy was incompetent or negligent in driving the truck, and that its motion for a finding in its favor should have been granted on that ground. It urges the proposition that "negligence will not be presumed where nothing is done out of the usual course of business unless that course is in itself improper." That proposition of law has no application to the facts of this case. The judgment is just and it will be affirmed.

AFFIRMED.

the defendant was not the owner and his control of the truck
was not established. This case cannot prevail. Although defendant's
conduct, contrary to defendant's orders, permitted the boy to
drive the truck, at the time the boy was the owner of
the truck, and defendant liable for his negligence. Boyle v.
Boyle, 7 Conn. 2d 60; Boyle v. Boyle, 122 Ill. 400;
123 Ill. 400; Boyle v. Boyle, 121 Ill. 400.

Appellant argues that there is no proof that the boy
was negligent, or negligent in driving the truck, and that the
evidence for a finding in the favor should have been granted on that
ground. It argues the proposition that negligence will not be
presumed where nothing is done out of the usual course of
conduct, and that course is in itself improper. That
proposition of law has no application to the facts of this case.
The argument is lost and is not to be sustained.

REVEREND
THE COURT
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24350

ALESSANDRO CONVORTI
Appellee,

vs.

BANK OF COMMERCE AND SAVINGS
(Impleaded with JOSEPH BALATA),
Appellant.

213 I.A. 651

INTERLOCUTORY.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order for an interlocutory injunction which was entered by the Circuit Court of Cook County upon the recommendation of a Master in Chancery upon a bill brought by appellee against one Joseph Balata for the specific performance of a contract.

Balata, the bill alleged, was a depositor in the bank of appellant. The bank was joined as a defendant and by order of court which is appealed from was restrained from honoring any check, draft or order issued by Balata against his funds on deposit with it. A copy of the contract sued on is attached to the bill. It is dated June 29th, 1917. The bill alleges the parties carried out all provisions thereof except the fifth clause by which it was provided that until Balata should pay appellee the sum of \$10,000 to take care of a mortgage upon the property described as the "North Halsted Street property", appellee should hold title to certain other real estate in the city of Chicago. Further that upon payment of said sum, said last named property should be deeded to Balata by appellee. The bill alleges that Balata failed to keep his promise to make such payment, although he had money in appellant's bank sufficient to enable him to do so and that appellee had been compelled to pay the interest on the mortgage to prevent foreclosure of it. It further alleged that Balata was a nonresident and about to remove his property

19

(Lithograph of a scene on the river bank)

100-443887-100

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

... should be devoted to details by application. The first stage

from the state, etc. setting up grounds which at law would entitle complainant to an attachment.

Appellee urges as ground for equitable jurisdiction that the matters out of which the contract between the parties arose were of a character which made Baiata's relationship thereto that of a fiduciary. The bill does not so allege, and if it did so the allegation would be unavailing for the reason that all prior matters were merged in the written agreement. The bill does not ask that this agreement be set aside, but on the contrary prays that it be enforced. Upon the face of the bill, appellee appears to be simply a contract creditor who has not reduced his claim to judgment and who seeks an attachment against the property of his debtor in equity. This he cannot do, his remedy being at law.

Detroit C. & B. R. W. v. Ledwidge, 162 Ill. 305; Ayres v. Graham
Steamship C. & L. Co., 150 Ill. App. 137.

The injunction order is reversed.

REVERSED.

...the ... of ...

... and now an attachment against the property of him

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education, and the need for employment. The process of urbanization has led to the growth of large cities and the decline of small towns. This has had a number of effects on the United States, including the concentration of population in a few areas, the loss of rural life, and the development of a new urban culture.

125 - 24044

PORTO RICO FRUIT EXCHANGE,
a corporation,
Appellee,

vs.

MICHIGAN CENTRAL RAILROAD
COMPANY, a corporation,
Appellant.

213 I.A. 652

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MACHETT DELIVERED THE OPINION OF THE COURT.

The appellee sued appellant alleging that it was the owner of a shipment of 250 crates of pineapples which were sent by it from New York in Interstate Commerce by the lines of defendant, a common carrier to Chicago, Illinois; that the shipment originated December 8, 1914, and upon arrival at Chicago was placed for delivery on defendant's team tracks in South Water street; that plaintiff promptly proceeded to and did unload all but 140 crates of said pineapples; that on December 14, 1914, at about 3 P. M. the weather commenced to turn cold; that to protect the pineapples, plaintiff with consent of defendant, or its agent, placed an oil stove in the car and defendant promised to watch the stove and extinguish the fire at 6 P. M. of that day; that plaintiff relied on said promise; that through the negligence of the defendant the pineapples were in part destroyed by fire and water and were further damaged by negligence of the defendant in not removing them to a safe place whereby they were frozen. The defendant denied all negligence as alleged. The cause was submitted to a jury and the parties offered evidence tending to prove their respective contentions. The jury returned a verdict for plaintiff on which judgment was entered.

The evidence showed that the car containing the

STRAITS

THE UNIVERSITY OF CHICAGO

Their respective confessions. The lady returned a verbal answer and the jurist offered evidence tending to prove that all negligence was alleged. The case was submitted.

100-443887-100

There is no evidence that the defendant was in any way involved in the destruction of the evidence. The defendant was not present at the time the evidence was destroyed and was not involved in the destruction of the evidence.

and defendant promised to watch the stove and extinguish

On 14. 1914, at about 3 P. M. the war was commenced to

to levitate may have been a common occurrence among the
of about 1800 and 1810 and was probably not really new
on at Baltimore witness the following and others

to the fact that the Commission has not yet received the information requested by the Commission in its letter of 10 October 1990.

... ..

pineapples was on December 11th at 3:30 P. M. placed on the public team tracks of appellant for delivery to consignee. It is conceded that the duties of defendant with respect thereto at the time the loss occurred was that of a warehouseman. It is true as appellant contends that the law as to its liability must be determined by the Federal Statutes and the decisions of the Federal Courts, the transaction being one in Interstate Commerce. Gamble, Robinson Co. v. U. P. R. R. Co., 262 Ill. 400; Southern Railway Company v. Prescott, 240 U. S. 632.

The court at the request of plaintiff gave this instruction, "The jury are instructed that where it has been shown that the goods were delivered to the defendant in good condition and that it failed to protect them and delivered them in a damaged condition, the presumption is that the defendant was negligent and it has the burden of proving the loss and damage resulted from some cause for which it is not responsible." By another instruction the jury was told, "The law does not require the plaintiff to accept goods which have been damaged to such an extent as to be in a worthless condition while in the hands of defendant as bailee." These instructions given at the request of plaintiff contradicted others given at the request of defendant in which the jury were told that the plaintiff did not make a prima facie case by showing that the property was delivered to the defendant in good order and was damaged while in its possession; that the plaintiff must prove the negligence alleged before any presumption of liability on the part of the defendant is raised. These last instructions correctly stated the law applicable to the undisputed facts of the case and to plaintiff's theory of it as alleged in its statement of claim. If the evidence showed the defendant had failed to deliver on demand, or delivered in a damaged condition

... was on December 11th at 11:30 P. M. ...
... as appellant for delivery to ...
... the date of delivery with respect to ...
... the time the loss occurred was that of a ...
... it was an appellant ... that the law as to the liability ...
... by the Federal Statutes and the conditions of ...
... the ... the ... being one in ...
... U. S. v. U. S. ...
... U. S. v. ...
... the ... of plaintiff gave this ...
... The jury was instructed that there it has been ...
... the goods were delivered to the defendant in good ...
... it failed to protect them and delivered ...
... the presumption is that the ...
... and it has the burden of proving the ...
... from some cause for which it is not ...
... the jury was said, "The ...
... the plaintiff to prove goods which have ...
... as to be in a ... condition ...
... the hands of defendant as before." These instructions ...
... the request of plaintiff contradicted others given as ...
... the jury were told that the ...
... the plaintiff was not a ...
... the defendant in good order and was ...
... the plaintiff must prove ...
... the defendant is ... These last instructions ...
... the law applicable to the ...
... of the case and to plaintiff's theory of it as alleged in the ...
... statement of claim. If the evidence showed the defendant had ...
... or delivered in a damaged condition

goods which had been delivered to it in good condition without further proof, this might make out a prima facie case against the defendant and a finding for the plaintiff might be justified therefrom. That was not the case alleged by plaintiff. The proof showed that the damage to the pineapples resulted from fire. The burden of proof therefore did not shift, but remained upon the plaintiff. This is the rule announced by the Federal Courts. It is controlling. Southern Railway Company v. Prescott, supra. For the error in giving these instructions the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

which might have been different, so is in good condition different

between them, this might have been a prima facie case against

the defendant and a finding for the plaintiff might be

justified therefrom. That was not the case alleged by plaintiff.

The court showed that the language in the photographs resulted from

the fact that the defendant of good character did not shift, but re-

turned upon the plaintiff. This is the rule announced by the

highest courts. It is controlling. See People v. [illegible]

People v. [illegible]. For the error in giving those instructions

the judgment is reversed and the cause remanded.

REVEREND AND HONORABLE

THE COURT IN THE SECOND DEPARTMENT OF THE STATE OF NEW YORK

IN THE MATTER OF THE APPEAL FROM THE JUDGMENT OF THE COURT OF THE SECOND DEPARTMENT OF THE STATE OF NEW YORK

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THE COURT IN THE SECOND DEPARTMENT OF THE STATE OF NEW YORK

152 - 24072

JOSEPH MARTIN,
Appellee,

vs.

MICHIGAN CENTRAL RAILROAD
COMPANY, a corporation,
Appellant.

213 I.A. 652

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellee, who was plaintiff below, sued appellant upon its contract to transport a shipment of one hundred hogs from Decatur, Michigan, to Celfax, Illinois. A judgment of \$500.00 for plaintiff on the verdict of a jury was entered. The consignor of the hogs was H. D. Wickett and plaintiff was the consignee. Plaintiff relied upon and introduced in evidence a "uniform Live Stock Contract" dated December 7, 1910, which recited that the defendant had received the hogs from H. D. Wickett for transportation to plaintiff in accordance with the terms and conditions of the contract. It was proved that the plaintiff never received the pigs mentioned in the contract, nor pay for them, and that the shipment in question was taken into Chicago and there sold on December 9, 1910. Plaintiff testified that he made inquiry for the pigs when they did not arrive at the time he expected and that if the stock had been delivered to him at Celfax within a reasonable time after shipment, their market value would have been 8½ cents per pound. The plaintiff did not attempt to prove that he had paid for the pigs, but on the contrary relied upon the presumption of ownership, arising out of the fact that he was named as consignee.

Defendant attempted to show that plaintiff never paid for or acquired the title to the pigs. The consignor was called as a witness for defendant and asked if he had ever been paid for the pigs by the plaintiff. An objection by

plaintiff was sustained. The fact that plaintiff was named as consignee in the bill of lading raised a presumption that he was the owner, but this was a presumption which might be rebutted by competent testimony. We think the court erred in sustaining the objection.

The contract of shipment provided, "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier or sued for in any court by the said shipper unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the Michigan Central agent of the said carrier at his office in Decatur within five days from the time said stock is removed from said car or cars, and that if any loss or damage accrues upon the line of a connecting carrier then such carrier shall not be liable unless a claim shall be made in a like manner and made in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs." It is not claimed that notice was given by plaintiff to the defendant, or to any-one of the carriers interested. As the shipment was an Interstate one, the law which must be applied is controlled by the Interstate Commerce Act and the decisions of the United States Courts construing the same. Gamble, Robinson Co. v. U. P. R. R. Co., 262 Ill. 400. This court had occasion to construe this same clause in a similar contract in the case of Sam Simpson v. Grand Trunk Ry. Co., No. 23306, not yet reported. We there held under the authority of Chesapeake & Ohio Ry. Co. v. McLaughlin, 242 U. S. 142, where the Supreme Court of the United States passed upon the same clause in a similar contract, that the notice (where nothing in the record tends to establish circumstances rendering it invalid or ^{excusing} failure to comply with it) was indispensable and that the plaintiff could not recover unless it was given. Similar authorities which might be cited are, Kidwell v. Oregon

... The fact that the bill of lading was issued by the carrier is the bill of lading issued a receipt for the goods and the carrier, and this was a receipt which was not to be taken as evidence of the receipt of the goods. The fact that the bill of lading was issued by the carrier is the bill of lading issued a receipt for the goods and the carrier, and this was a receipt which was not to be taken as evidence of the receipt of the goods.

The contract of carriage provided, "That no claim for damages shall be allowed or paid by the carrier or vessel for any loss or damage to the goods unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the consignee within five days from the date the goods are received by the consignee and that it was a damage caused upon the line of a connecting carrier then such carrier shall not be liable unless a claim shall be made in a like manner and made in time to some proper agent or agent of the carrier on whose line the loss or injury occurred." It is not claimed that notice was given by plaintiff to the defendant, or to anyone of the carrier interested, as the shipment was an interstate one, the law which must be applied is controlled by the Interstate Commerce Act and the decisions of the United States Supreme Court concerning the same. Danville, Virginia Co. v. E. F. E. & Co., 262 Ill. 400. This court had occasion to construe this same clause in a similar context in the case of Sam. Johnson v. Great Lakes Ry. Co., 262 Ill. 400, not yet reported. We there held that the authority of Chicago & North Western Ry. Co. v. Minneapolis & St. Paul Ry. Co., 262 Ill. 400, where the Supreme Court of the United States passed upon the same clause in a similar context, that the notice (where nothing in the record tends to establish a connection between it invalid or \

... and that the plaintiff could not recover unless it was given.

Similar authorities which might be cited are, Nichols v. Oregon

Short Line R. Co., 208 Fed. 1; Clegg v. St. Louis & S. F. R. Co., 203 Fed. 971; Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190; Erie R. R. Co. v. Stone et al., 244 U. S. 332. There are no facts in this case tending to show the notice provided for was invalid or ^{to} excuse the failure to give it. The plaintiff's evidence showed the son of the consignor, who on plaintiff's theory of the case was plaintiff's agent, accompanied the stock. It also showed notice to plaintiff in ample time (December 9, 1910) of the sale and delivery of the pigs in Chicago. Defendant was not notified of any claim by plaintiff so far as the record shows until the beginning of this suit June 21, 1916.

Appellee urges that the defendant waived the defense of want of notice by not specially pleading it, citing Boyd v. King, 167 N. W. 901. However, in A. J. Phillips Co. v. Grand Trunk Western Ry. Co., 236 U. S. 662, the Supreme Court of the United States held that appellant had no right to and could not waive this defense.

The judgment is reversed and as the plaintiff can in no event recover the cause will not be remanded.

REVERSED.

1. The first part of the document is a list of names and dates, which appears to be a roster or a list of events. The names are written in a stylized, possibly cursive or shorthand, script. The dates are written in a similar script, often followed by a year. The list is organized into columns, with names on the left and dates on the right. Some names are preceded by a small number, possibly indicating a page or a section. The list is quite long, spanning several lines of the document.

[illegible]

Appellate argues that the defendant waived the defendant's right to a trial by jury by not specifically pleading it, citing Smith v. [redacted], 194 N.E. 2d 1001. However, in A. L. Phillips Co. v. [redacted], 194 N.E. 2d 1001, the Supreme Court of the State of New York held that appellant had no right to and could not have this defense.

...the

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155 - 24075

JAMES T. SWAGGERTY,

Appellee,

vs.

SULAN SWAGGERTY,

Appellant.

213 T. A. 652

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, from a decree of divorce in favor of complainant, which also dismissed defendant's cross bill for want of equity.

The bill of complaint charged the defendant with adultery. The cross bill alleged extreme and repeated cruelty. Upon a hearing the court dismissed the cross bill for want of equity and entered the decree herein complained of.

But two questions are presented for determination upon this appeal, viz., (1) Is the evidence in this record sufficient to sustain the charge of adultery, and (2) If so, was there a condonation of the offense?

As we view the case, it becomes necessary for us to pass upon only the second question.

The evidence shows that subsequently to the alleged adulterous acts on the part of defendant, of which complainant had knowledge, he and the defendant went to the home of her parents in the city of Alton, Illinois, where they remained overnight, during which period they occupied the same sleeping quarters, and according to the testimony of the defendant, cohabited as husband and wife during said period, although complainant denied the latter.

It further appears from the evidence, that upon their return to Chicago, complainant advised defendant to go with their child to the country and remain there for the summer; that it was

also agreed that upon her return with the child in the fall, they would resume their marital relations; that defendant returned to the city, however, before the stated time; that upon her return, complainant advised her to obtain a room for herself and their child; that he paid the rental thereof; and that on several occasions complainant visited defendant there, and, according to defendant's testimony, he had sexual intercourse with her on these occasions, although this was denied by him; that shortly thereafter complainant started this action for divorce.

Defendant testified further, that she became pregnant after he cohabitation with complainant on the aforesaid visit to the home of her parents, and offered to submit to a medical examination to establish the fact of her pregnant condition.

The record is entirely barren of evidence of any improprieties on the part of the defendant subsequently to the said visit to the home of her parents.

It is well settled, that cohabitation with the offending party after the commission of adultery, with knowledge of the alleged offense, is a remission of it and a defense to an action for divorce.

In our opinion, the foregoing evidence establishes the cohabitation of the parties after the commission of the alleged adulterous acts by defendant, and it follows that complainant has condoned the offense with which he charged defendant in his bill of complaint.

The court therefore erred in entering the decree complainant of insofar as it granted the relief prayed for in the bill of complaint.

In our opinion, however, the court properly dismissed defendant's cross bill for want of equity. Accordingly the decree will be affirmed in part and reversed in part and the cause remanded with directions to dismiss complainant's bill of complaint for want of equity.

AFFIRMED IN PART. REVERSED IN PART AND REMANDED WITH DIRECTIONS.

also agreed that upon her return with the child in the fall, they
would remain with her until the child was born; that defendant refused to
do this, however, before the stated time; that upon her return,
defendant advised her to obtain a room for herself and child;
that, that he said she could do so; and that on several
occasions defendant visited defendant at home, and, according to
defendant's testimony, he had sexual intercourse with her on those
occasions, although this was denied by him; that shortly thereafter
defendant started this action for divorce.

Defendant testified further, that she became pregnant
after the cohabitation with defendant on the aforesaid visit to
the home of her parents, and offered to submit to a medical ex-
amination to establish the fact of her pregnant condition.
The record is entirely barren of evidence of any
interference on the part of the defendant subsequently to the
fall visit to the home of her parents.

It is well noted, that cohabitation with the plaintiff
after the commission of adultery, with knowledge of the
alleged offense, is a maintenance of it and a bar to an action
for divorce.
In our opinion, the foregoing evidence establishes the
cohabitation of the parties after the commission of the alleged
adulterous acts by defendant, and it follows that defendant has
maintained the offense with which he charged defendant in his bill.

The court therefore erred in entering the decree complained
of, and as it granted the relief prayed for in the bill it
is reversed.
In my opinion, however, the court properly dismissed
defendant's cross bill for want of equity. Accordingly the
decree will be affirmed in part and reversed in part and the
court remanded with directions to dismiss complainant's bill of

164 - 24085

NOAH A. LEHMAN,
Appellant,

vs.

GEORGE P. BENT COMPANY,
a corporation,
Appellee.

2131A, 652

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Appellant, Noah A. Lehman, brought an action against the George P. Bent Company, defendant, to recover damages for the alleged breach of a contract. The court found the issues for the defendant, and from the judgment entered thereon plaintiff has prosecuted this appeal.

It appears from the evidence that on May 28, 1917, plaintiff ordered a piano from the defendant, known as "Style 408 Crown, in polished Oak;" that according to the said order the piano was to be shipped by June 15th; that under date of May 29, defendant acknowledged receipt of the said order but stated that their stock of the said style of piano was at that time exhausted and suggested shipping another style, viz., "Style 414 in Oak," in its stead; that on June 1 plaintiff wrote defendant to ship him a "Style 414 in Mahogany," instead of the "Style 408 in Oak" ordered on May 28th; that subsequently to the receipt of the said letter, defendant wrote plaintiff that it could not make shipment because of the fact that another agent had the exclusive right of sale in the territory in which plaintiff resided. It appears further from the testimony that plaintiff ordered the said piano with a view to selling it at a profit.

The sole question here presented for determination is,

2131A-682

EXHIBIT

NO. 1

EXHIBIT NO. 1

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whether or not the aforesaid negotiations constituted a contract.

It will be seen that the aforesaid order of May 28th to ship a Style 408 Crown plane in Oak by June 15, 1917, was not accepted by the defendant, but that instead defendant suggested shipping a Style 414 in Oak; that the plaintiff in turn sent in a counter order for a Style 414 in Mahogany, which said counter order was never accepted by the defendant, and hence there was no meeting of the minds of the parties and consequently no contract.

Accordingly the judgment will be affirmed.

AFFIRMED.

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doi:10.1017/S002229240000218

[illegible]

From your letter of 10/10/1919, I have received your letter of 10/10/1919, and I am sorry to hear that you are not well.

These data are presented in Table 1. The results show that the mean age of the subjects was 21.5 years, with a range of 18 to 24 years. The mean height was 175 cm, with a range of 165 to 185 cm. The mean weight was 70 kg, with a range of 60 to 80 kg. The mean BMI was 22.5, with a range of 20 to 25. The mean waist circumference was 85 cm, with a range of 75 to 95 cm. The mean hip circumference was 100 cm, with a range of 90 to 110 cm. The mean waist-to-hip ratio was 0.85, with a range of 0.75 to 0.95. The mean systolic blood pressure was 115 mmHg, with a range of 105 to 125 mmHg. The mean diastolic blood pressure was 75 mmHg, with a range of 65 to 85 mmHg. The mean heart rate was 70 bpm, with a range of 60 to 80 bpm. The mean resting metabolic rate was 1800 kcal/day, with a range of 1600 to 2000 kcal/day. The mean energy intake was 2500 kcal/day, with a range of 2200 to 2800 kcal/day. The mean energy expenditure was 2200 kcal/day, with a range of 2000 to 2400 kcal/day. The mean energy balance was 300 kcal/day, with a range of 100 to 500 kcal/day. The mean fat mass was 15 kg, with a range of 12 to 18 kg. The mean lean mass was 55 kg, with a range of 50 to 60 kg. The mean total mass was 70 kg, with a range of 62 to 78 kg. The mean bone mass was 3 kg, with a range of 2.5 to 3.5 kg. The mean bone mineral density was 1.0 g/cm³, with a range of 0.9 to 1.1 g/cm³. The mean bone mineral content was 12 kg, with a range of 10 to 14 kg. The mean bone mineral density of the spine was 1.1 g/cm³, with a range of 1.0 to 1.2 g/cm³. The mean bone mineral density of the hip was 1.0 g/cm³, with a range of 0.9 to 1.1 g/cm³. The mean bone mineral density of the forearm was 0.9 g/cm³, with a range of 0.8 to 1.0 g/cm³. The mean bone mineral density of the total body was 1.0 g/cm³, with a range of 0.9 to 1.1 g/cm³. The mean bone mineral content of the spine was 2 kg, with a range of 1.5 to 2.5 kg. The mean bone mineral content of the hip was 2 kg, with a range of 1.5 to 2.5 kg. The mean bone mineral content of the forearm was 1 kg, with a range of 0.5 to 1.5 kg. The mean bone mineral content of the total body was 12 kg, with a range of 10 to 14 kg. The mean bone mineral density of the spine was 1.1 g/cm³, with a range of 1.0 to 1.2 g/cm³. The mean bone mineral density of the hip was 1.0 g/cm³, with a range of 0.9 to 1.1 g/cm³. The mean bone mineral density of the forearm was 0.9 g/cm³, with a range of 0.8 to 1.0 g/cm³. The mean bone mineral density of the total body was 1.0 g/cm³, with a range of 0.9 to 1.1 g/cm³. The mean bone mineral content of the spine was 2 kg, with a range of 1.5 to 2.5 kg. The mean bone mineral content of the hip was 2 kg, with a range of 1.5 to 2.5 kg. The mean bone mineral content of the forearm was 1 kg, with a range of 0.5 to 1.5 kg. The mean bone mineral content of the total body was 12 kg, with a range of 10 to 14 kg.

accepted by the defendant, and hence

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 04-12-2000 BY 60322 UCBAW

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CHERRY PEA

183 - 24104

MARTIN QUINN,
Appellee,

vs.

EDWARD A. PERREAULT,
Appellant.

213 I.A. 652

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for \$119.30 entered in a fourth class municipal court case, for wrongfully running into and damaging plaintiff's automobile.

Plaintiff makes the point that the original bill of exceptions has been incorporated in the record, contrary to the law, and that it fails to show any motion for a new trial having been made by defendant in the court below.

In Marshall Field & Co. v. Nyman, 285 Ill. 306, it was held/on appeal, courts of review may pass upon a transcript of the record only, and that the provision of the Municipal Court Act authorizing incorporation of the original stenographic report or bill of exceptions in the record is invalid, for the reason that it conflicts with the Practice Act governing appeals. For this reason alone the judgment must be affirmed.

Nevertheless, we have examined the record filed herein, and from such examination are of the opinion that the judgment is warranted by the facts as well. Accordingly it will be affirmed.

AFFIRMED.

170 - 24091

HIRSHMAN EMMERMAN,
Appelles,

vs.

BENJAMIN F. J. ODELL,
Appellant.

213 I.A. 653

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In December, 1916, appellee who was plaintiff below, exchanged flat buildings with appellant. In adjusting their accounts as to the respective properties, it was agreed that the taxes for plaintiff's property known as the Ridgewood Building, should be estimated at \$375.00 and that when the tax bills should be available, the differences would be adjusted; that if it proved to be less, the defendant would pay the difference to Emmerman, the plaintiff; if more, then Emmerman should pay Odell, the defendant, the difference. When the tax bill was available, it appeared that the taxes had been levied against the lot only, without the building, and that these amounted to \$75.70. Plaintiff demanded that the defendant pay to him this difference which he refused to do and when sued, filed a claim for set-off in which he alleged that in the transaction by which the properties were exchanged, the plaintiff had made false representations to him upon which he relied and by which he had been deceived and damaged. These representations were set up in detail and referred to the rentals received from the building, the conditions of its company etc. The off-set was stricken by the motion judge and upon the trial the court refused to receive the evidence tending to sustain it. The record does not clearly show for what reason the claim of set-off was stricken, but it was done apparently on the theory that as it

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was in the nature of a tort, it could not be maintained as a set-off to plaintiff's action which was upon a contract. As the demand arose out of the same subject matter, and upon the contract concerning which plaintiff sued, defendant should have been permitted to recoup if the facts justified a finding in his favor. It was, therefore, error to exclude the evidence offered.

In Burroughs v. Belleck, 185 Ill. App. 446, the court says:

"It is the settled law of this state that a claim originating in contract may by recoupment in order to prevent circuity of action, be set up against one founded in tort, if the counterclaim arises out of the same subject-matter and is susceptible of adjustment in one action. So, also, may claims in contract or in tort be set up by recoupment against one founded in contract if the counterclaim arises out of the contract sued on, although the counterclaims are for unliquidated damages. Brigham v. Hawley, 17 Ill. 38; Babcock v. Trice, 18 Ill. 420; Stow v. Yarwood, 14 Ill. 424; Lunn v. Gage, 37 Ill. 20; Schuchmann v. Knoebel, 27 Ill. 175; Bates v. Courtwright, 36 Ill. 518; Streeter v. Streeter, 43 Ill. 155; Murray v. Carlin, 67 Ill. 286; Cooke v. Preble, 80 Ill. 381; Baker v. Fawcett, 69 Ill. App. 300."

For the error indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

...the nature of a fact, it could not be maintained on a ... it is plaintiff's action which was upon a contract. In the ... of the same subject matter, and upon the ... plaintiff nor coming within plaintiff's own, defendant should have ... to recover if the facts justified a finding in his ... it was, however, your is certain the evidence offered.

THE UNIVERSITY OF CHICAGO

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177 - 24098

LEO DETREY,
Appellee,

vs.

HARRY CREGAR,
Appellant.

237a
213 I.A. 653

APPEAL FROM

SUPERIOR COURT OF
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, appellee, sued the defendant alleging the conversion of a Cadillac automobile of the value of \$900. Appellant, defendant, pleaded not guilty. The case was tried by a jury and upon its verdict for plaintiff, the court entered judgment.

The automobile in question was purchased from the defendant, Harry Cregar, on November 1, 1913. The son of Harry Cregar, one Arthur Cregar, acted as agent for his father in making said sale. It was claimed by plaintiff, but denied by defendant that as a part of the transaction the defendant promised to keep the automobile in repair for a year. The defendant further denied the authority of his son, Arthur, to make the contract to repair.

Defendant at the time was engaged in the business of dealing in secondhand automobiles at Forest Park, Illinois, under the name of the Royal Motor Car Works. He owned the business, the son Arthur ran it, and his name was printed on the business card used. On February 1, 1914, this business was sold to one Condon. It was thereafter conducted under a different name. Arthur Cregar discontinued his connection with it. At the time of the transfer the sign over the business was changed but no notice was given to the plaintiff of the discontinuance of the business and plaintiff

1. The first part of the document is a list of names and addresses, which are arranged in two columns. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Johnson", along with their respective addresses.

doi:10.1371/journal.pone.0136005.g002

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plaintiff of the discontinuance of the business and plaintiff's business was changed but no notice was given to the public. At the time of the transfer the sign over the door of the business was changed but no notice was given to the public. At the time of the transfer the sign over the door of the business was changed but no notice was given to the public. At the time of the transfer the sign over the door of the business was changed but no notice was given to the public.

denies knowledge that it had been so discontinued.

Plaintiff testifies about the first of March,

1914, "I telephoned Arthur Cregar and got him; one of the adjustments was bad on the car; would he fix it; he got the car himself and said he would make the adjustments and I could have it in three days time." After repeatedly calling for the car without getting it, plaintiff wrote defendant April 17, 1914, and on April 20th, the defendant replied that he had sold the business about three months before, adding "you will have to see the party to whom you turned your machine over to." Plaintiff further testifies that Arthur Cregar then came to see him and told him the car had been stolen while he, Arthur, was driving it; that another time Arthur said some fellows had taken the car from out in front of the saloon for a joy ride and it was run into and smashed up; that he knew the fellows and would make them pay. Upon the trial Arthur testified that the car was taken for repairs to the garage of one Klein; that Klein drove the car to the saloon of Arthur and while standing in front of the saloon, it was stolen. Klein was not produced, nor was his absence well accounted for. We think the jury did not believe Arthur's testimony. We do not believe it. The verdict must be regarded as settling the controverted facts in the case in favor of the plaintiff.

Appellant contends that the action should have been a special one in case, instead of trover; that such is the proper form of action where goods are stolen from a bailee through his negligence and that in such case the burden is on the plaintiff to and he must prove negligence. We do not question these rules of law, but do not regard them as applicable to the facts of this case as the same are settled by the verdict of the jury. The evidence for plaintiff

... knowledge that it had been so demonstrated.
Plaintiff testified about the time of March, 1914, "I telephoned Arthur Brown and got him; one of the adjustments was put on the car; would he fix it? He said the car himself and said he would make the adjustments and I could have it in three days time." After respondent testified for the car without getting it, plaintiff wrote respondent April 17, 1914, and on April 20th, the defendant would that he had sold the business about three months before, saying "You will have to see the party to whom you sold your machine over to." Plaintiff further testified that Arthur Brown came to see him and told him the car had been stolen while he, Arthur, was driving it; that another man Brown said some fellow had taken the car from out in front of the saloon for a few days and it was run late and damaged it, that he knew the fellow and would make them pay. From the trial Arthur testified that the car was taken for repairs to the garage of one Klein; that Klein drove the car to the saloon of Arthur and while standing in front of the saloon, it was stolen. Klein was not produced, nor was his name well accounted for. We think the jury did not believe Arthur's testimony. We do not believe it. The verdict was in favor of the defendant. The court directed the jury in the case in favor of the plaintiff.

Appellant contends that the action should have been a special one in case, instead of trover; that such is the proper form of action where goods are stolen from a bailee through his negligence and that in such case the burden is on the plaintiff to and he must prove negligence. We do not believe these rules of law, but do not regard them as applicable to the facts of this case as the same are settled by the verdict of the jury. The evidence for plaintiff

which the jury apparently believed, showed that the automobile was delivered to Arthur Cregar pursuant to the contract made by him in defendant's behalf to repair it which he agreed in defendant's behalf to do and return it in three days. In such case the rule of law applicable is as stated in Dolphin v. Davis, 183 Ill. App. 118. "If the article is used in a different manner, or for a longer time than was agreed by the bailor, the bailee is guilty of conversion and is answerable for all damages and even for a loss which due care could not have prevented." We think the proof was ample to sustain a verdict of guilty of conversion.

Appellant complains of instruction No. 1 given at the request of plaintiff. There were controverted questions of fact in the case with reference to the extent of the authority of Arthur Cregar to make the contract to repair, and as to whether he was the agent of the defendant at the time he received the car for the purpose of repairing it. With reference thereto this instruction told the jury, -

"The court instructs the jury that as a matter of law the principal is held liable for the wrongful acts of his agent if done in the course of employment as such agent, although the principal did not authorize, justify or participate in such acts, or even if the principal forbade the acts or disapproved of them. And in this case if you believe from the evidence that the said Arthur Cregar did procure from the plaintiff possession of the said Cadillac automobile, mentioned in the declaration, for the purpose of repairing the same, and that in procuring the possession of the said automobile for the purpose of repairing the same, the said Arthur Cregar was acting as the apparent agent of the defendant and within the scope of his former employment as such agent, and if you further believe from the evidence that the said Arthur Cregar and the defendant, Harry Cregar, failed or neglected to return the said automobile to the plaintiff when requested to do so, then, even though you believe from the evidence that the defendant had terminated such agency prior to the procuring of the possession of said automobile by said Arthur Cregar, nevertheless, you must find the defendant Harry Cregar, guilty, unless you further believe from the evidence that the plaintiff had notice of the termination of such agency prior to giving of said automobile into the possession of said Arthur Cregar or by reasonable diligence would have known of the termination of such agency."

which the jury apparently believed, showed that the automobile was delivered to Arthur Gregory pursuant to the contract made by him in defendant's behalf to repair it within ten days. In defendant's behalf to do and return it in three days. In fact the rule of law applicable is as stated in Poland v. Smith, 188 Ill. App. 118. "If the article is used in a different manner, or for a longer time than was agreed by the parties, the parties are guilty of conversion and is answerable for all damages and even for a loss which has been caused not have occurred." We think the proof was ample to establish a violation of duty of conversion.

Appellant complains of instruction No. 1 given as the request of plaintiff. There were controverted questions of fact in this case with reference to the extent of the authority of Arthur Gregory to make the contract to repair, and as to whether he was the agent of the defendant at the time he received the car for the purpose of repairing it. The reference thereto this instruction told the jury, -

"The court instructs the jury that as a matter of law the principle is held applicable for the purpose of his agent if done in the course of employment, as such agent, with such authority as is given to him, in duty or performance in such acts, or even if the defendant's agent is not on duty or in the course of his employment, if you believe from the evidence that the said Arthur Gregory did procure from the plaintiff possession of the said Cadillac automobile, with the intention, for the purpose of repairing the same, and that in procuring the possession of the said automobile for the purpose of repairing the same, the said Arthur Gregory was acting as the apparent agent of the defendant and within the scope of his former employment as such agent, and if you further believe from the evidence that the said Arthur Gregory and the defendant, Arthur Gregory, failed or neglected to return the said automobile to the plaintiff as requested to do so, then, even though you believe from the evidence that the defendant had terminated such agency prior to the procuring of the possession of said automobile by said Arthur Gregory, nevertheless, you must find the defendant Harry Gregory, guilty, unless you further believe from the evidence that the plaintiff had notice of the termination of such agency prior to giving of said automobile into the possession of said Arthur Gregory or of reasonable diligence would have known of the termination of such agency."

It is claimed this instruction is erroneous in that it assumes that the defendant was requested to return the automobile, and also that it assumes that Arthur Cregar procured the possession of the automobile, both of which it is claimed were controverted questions of fact in the case. The various requests for the return of the automobile as testified to by the plaintiff were not contradicted. It, therefore, was clearly not a controverted question of fact. Nor do we regard the procuring of possession of the automobile by Arthur Cregar as controverted. There was no evidence from which the jury could reasonably have found that he did not procure such possession. The instruction substantially and accurately sets forth the law applicable. Meeker v. Mannia, 162 Ill. 208.

The judgment is just and it will be affirmed.

AFFIRMED.

LAURA H. MCKAIG, MARY BOTTLER (Formerly known as Mary Boteler Beckley) LAURA HUGHES BOTTLER, and WILLIAM C. BOTTLER,

Plaintiffs in Error.

vs.

ERROR TO
CIRCUIT COURT,
COCK COUNTY.

KRENNER APPELTON, THE CHICAGO TITLE & TRUST COMPANY (a corporation), as Executor of the Last Will and Testament of George R. H. Hughes, THE CHICAGO TITLE & TRUST COMPANY as Trustee of the Last Will and Testament of GEORGE R. H. HUGHES, HARRISON B. RILEY, as Trustee under the Last Will and Testament of GEORGE R. H. HUGHES, RICHARD H. PLEASANTS, RICHARD H. PLEASANTS, as Trustee under the Last Will and Testament of GEORGE R. H. HUGHES, GREEN MOUNT CEMETERY (a corporation), MARY A. CORNISH, NELLIE SANS, ST. PAUL REFORMED EPISCOPAL CHURCH, Trustees of the association or society known as Scroll & Key at Yale College and REGINALD HUGHES MCKAIG,

Defendants in Error.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This writ of error is prosecuted to reverse a decree of the Circuit Court of Cock County sustaining the last will and testament and codicil thereto of George R. H. Hughes, deceased. Complainants in their bill alleged that the will and codicil were invalid upon two grounds; (1) that the testator was not of disposing mind and memory at the time of the execution of the will and codicil; and (2) that the execution of the will and codicil was the result of undue influence. Some of the defendants filed exceptions to the allegations of the bill which sought to charge undue influence. The exceptions were sustained and the allegations stricken out.

The complainants first contend that the court

213 I.A. 653

2181A. 623

THE STATE OF TEXAS,
COUNTY OF DALLAS.

Know all men by these presents, that

JOHN A. BROWN, of the County of Dallas, State of Texas,

do hereby certify that the within and foregoing

is a true and correct copy of the original

as the same appears from the records of the

County of Dallas, State of Texas, and that

the same is a true and correct copy of the

original as the same appears from the records

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erred in striking out the allegations of undue influence. The grounds on which the exceptions were sustained and the allegations stricken out were that they were impertinent, for the reason that they constituted a mere recital of evidence instead of ultimate facts proposed to be proved. The allegations stricken out were in substance that certain of the heirs of the testator would receive certain specific amounts from the estate of the testator in case the will was set aside different from that provided by the will; that at the time of the execution of the will and codicil the testator was under the care and domination of Mary A. Cornish, one of the legatees and defendants; that she was acting as a nurse and attending upon the deceased and had been so acting for a long time prior to the execution of the will and codicil; that she was a person of dominating and insistent character, and the testator who was over eighty years old, was blind and afflicted with diseases; that the deceased's next of kin resided in distant cities; that Mary A. Cornish by reason of her intimate associations with the deceased, had intimate knowledge of his business and private affairs; that she transacted some of his business; that by reason of these facts, a confidential relation existed between them; that she was the dominant party and the testator the dependent party; that the alleged will made different provisions from a prior will executed by the testator in 1911, by the terms of which she would receive an annuity of \$500; that by a codicil to this will the annuity was increased to \$600; that by the will in question she was to receive an annuity of \$800, and by the codicil in question this was increased to \$1300; that the will and codicil were procured to

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The following is a list of the names of the persons who were present at the meeting of the Board of Directors of the United States National Bank, held on the 10th day of January, 1900, at the City of New York:

Mr. J. P. Morgan	Mr. J. D. Rockefeller	Mr. C. D. Smith	Mr. W. A. Harriman
Mr. F. B. Edwards	Mr. J. H. Morgan	Mr. J. C. Smith	Mr. J. D. Rockefeller
Mr. J. P. Morgan	Mr. J. D. Rockefeller	Mr. C. D. Smith	Mr. W. A. Harriman
Mr. F. B. Edwards	Mr. J. H. Morgan	Mr. J. C. Smith	Mr. J. D. Rockefeller

The following is a list of the names of the persons who were present at the meeting of the Board of Directors of the United States National Bank, held on the 10th day of January, 1900, at the City of New York:

Mr. J. P. Morgan	Mr. J. D. Rockefeller	Mr. C. D. Smith	Mr. W. A. Harriman
Mr. F. B. Edwards	Mr. J. H. Morgan	Mr. J. C. Smith	Mr. J. D. Rockefeller
Mr. J. P. Morgan	Mr. J. D. Rockefeller	Mr. C. D. Smith	Mr. W. A. Harriman
Mr. F. B. Edwards	Mr. J. H. Morgan	Mr. J. C. Smith	Mr. J. D. Rockefeller

be executed by her and others acting in concert with her; that such facts establish as a matter of law the existence of undue influence exercised upon the testator and invalidated the will and codicil; that the testator was prejudiced against a nephew and niece by reason of a delusion that they were unworthy persons; that they were excluded by the provisions of the will, and that it was executed under the influence of such delusion.

It is clear that many of the allegations stricken out were mere recitals of evidentiary facts. Indeed this is conceded to be true by the complainants, but it is argued that they are not impertinent for this reason; that the true test "to determine whether allegations of a pleading in equity are impertinent, is, that any allegations which, if proved, will entitle the party in whose pleading the same occurs to prevail, is pertinent; and to strike the same out is erroneous." Manifestly this is not the true rule, for if it were, then one could plead all their evidence in extenso. But the complainants say that the "question of pleading evidence does not enter into consideration upon the decision of exceptions based upon scandal or impertinence," and in support of this cite Story's Equity Pleading, Sec. 263. The author there says: "In examining the question, whether an allegation or statement in the bill is relevant or pertinent, it must be recollected that a bill in chancery is not only a pleading for the purpose of bringing before the court, and putting in issue the material allegations and charges upon which the plaintiff's right to relief rests, as is done in a declaration in a suit at law; but it is also, in most cases, an examination of the defendant upon oath, for the purpose of obtaining evidence to establish the plaintiff's case, or

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counter prove or destroy the defense which may be set up by such defendant in answer. The plaintiff, may, therefore, state any matter of evidence in the bill, or any collateral fact, the admission of which, by the defendant may be material in establishing the general allegations of the bill, as a pleading, or in ascertaining or determining the nature, and the extent, and the kind of relief, to which the plaintiff may be entitled, consistently with the case made by the bill; or which may legally influence the court in determining the question of costs. And where any allegation or statement contained in the bill may thus effect the decision of the cause, if admitted by the defendant, or established by proof, it is relevant, and cannot be excepted to as impertinent." In the instant case, however, the bill does not require answer under oath, but answer under oath is expressly waived, and an examination of the defendant upon oath, for the purpose of obtaining evidence to establish the plaintiff's case, is not sought by the bill. Where a bill seeks relief but not discovery it does not require an answer under oath, and allegations of evidence and the like are impertinent. Camden Etc. R. Co. v. Stewart. 19 N.J. Eq. 343. In 1 Barbour's Chancery Practice, p. 41, the author says: "Impertinence is the same kind of fault in pleadings in equity which in those at common law is denominated surpluages. This at law, taken in its largest sense, includes the introduction of unnecessary matter of whatever description, and includes the admission of matter wholly foreign as well as of matter, which though not wholly foreign does not require to be stated or which, if stated, should be stated with conciseness." Since many of the allegations stricken out admittedly

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set up evidentiary facts, and answer under oath having been waived, such allegations are clearly impertinent, and the exceptions to them were properly sustained. Planes v. Goodspeed, 104 Ill. 184.

The next point is that the court should have permitted complainants to amend their bill on the trial of the cause, and in support of this ^{is} said that on the trial the defendants, who were proponents of the will, first introduced evidence of the validity of the will and codicil, and that two witnesses who were called on behalf of the defendants testified that there was no undue influence used in procuring the testator to execute the will and codicil, and that other evidence was also adduced by the defendants on this issue; that it was brought into the case by the defendants, and as soon as this appeared complainants moved to amend their bill so as to set up undue influence, and that the denial of such motion was error. The record discloses that the bill was filed July 23, 1915; that it was amended August 11th, following; that the order sustaining the exceptions and striking out the allegations of undue influence was entered October 15, 1915, and on November 4th following, a replication was filed. Nothing further appears to have been done until the case was called for trial, February 6, 1917. The proponents introduced their evidence, which took approximately three days, and at the close of their evidence the motion of complainants for leave to amend was made. We think it clear that there was no abuse of discretion in the court's denying the motion at that late day. It was a simple matter to draft the amend-

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ment proposed, and no excuse appears why it was not offered before, except that complainants in their reply brief say that the trial judge who sustained the exceptions held that the allegations stricken were "provable under a bill to contest a will which alleged lack of testamentary capacity," and that when the case came on for trial before another judge, the defendants contended that evidence of undue influence could not be introduced under the pleadings as they then stood, which was contrary to the position taken by them when the exceptions were sustained. This position seems to be inconsistent, in that it is first argued that complainants should have been permitted to make the amendment for the reason that the question of undue influence was brought into the case by the defendants in their case in chief, and in explaining their delay in making application, they put in on an entirely different ground, viz: that they understood they could put in evidence of undue influence under an allegation which set up lack of testamentary capacity. The bill as the case went to trial, sought to have the will set aside on the ground that the testator was of unsound mind, and there was no allegation then in the bill that its execution was the result of undue influence. These two grounds, unsound mind and undue influence, are separate and distinct and are so understood by all members of the profession. It is clear that the bill as the case went to trial would not warrant a decree setting aside the will on the ground of undue influence. We are therefore unable to see how the complainants' rights were in any way prejudiced by such action.

It is also urged that since the defendants put in affirmative evidence that there was no undue influence, the court should not have instructed the jury that there was no

issue of undue influence in the case. This is manifestly unsound as the only issue made by the pleadings was whether the testator was of sound and disposing mind. It is finally contended on this proposition that the evidence in the record that tended to show undue influence should have been considered as tending to establish lack of testamentary capacity, and that the court erred in refusing the instruction offered by the complainants. Of course, any evidence that remained in the record should have been submitted to the jury in determining the issue before them, but the instruction was wrong for a number of reasons. It attempted to get before the jury the question of undue influence, and as this was not an issue in the case, the instruction was properly refused. The omission of this issue in the bill manifestly cannot be supplied by an instruction.

The next point urged why the decree should be reversed is that the verdict is against the manifest weight of the evidence; that to sustain the verdict the evidence must show that the testator at the times he executed the will and codicil knew: (1) who were the objects of his bounty; (2) the nature and extent of his property; (3) the nature and effect of executing the will and codicil; that the evidence fails to meet these requirements. The evidence discloses that the testator was educated and was a lawyer; that he had been in the real estate business; from some of his correspondence it appears that he had a cultivated mind and possessed literary ability; that he was a bachelor and none of his relatives lived in Chicago; that some of them lived in Maryland, others in California, and others in Minnesota, and that aside from a nephew who visited with him occasionally,

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he had not associated with his relatives for a number of years, and for many years his closest friend was Mary A. Cornish, a widow who took care of his room where he lived, and also acted in the capacity of a nurse; that she visited him daily, attending to his wants from nine or ten o'clock in the morning to four or five o'clock in the afternoon. The evidence as to the amount he paid her for her services is not entirely satisfactory. For many years he lived alone on the west side of Chicago, occupying a room in a rooming house. Substantially all of his estate was a note for \$44,000, secured by mortgage on real estate in Chicago. He was more than eighty years old, enfeebled in health and was almost totally blind. This condition gradually grew upon him, and as a consequence he required more of Mrs. Cornish's services and attention. For many years Robert F. Pettibone, a lawyer practicing at the Chicago Bar for over thirty years, had been his personal attorney, and in 1910, he first consulted Mr. Pettibone about making his will. No one was present at this consultation except the testator and Mr. Pettibone, and on May 15, 1911, he called on Mr. Pettibone and stayed at his office almost the entire day, dictating and redictating his will, which was then executed and attested. This will provided for the following annuities: Laura H. McKaig, \$300; Laura H. Beteler, \$200; Mary A. Cornish, \$500; Mrs. Hansel, \$500; Nellie Sans, \$200. There was a further bequest to trustees, and it was provided that in case such bequest was held void for any reason, then that fund should go to his heirs at law, excluding, however, his nephew William C. Beteler and his niece Mary Beteler Beckley. Afterwards, January 25, 1913, he made and executed two codicils to this will. By the first he provided that Mrs. Cornish's annuity should be \$600, and the second disposed of certain

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personal effects, and \$100 for the perpetual care of a lot in the cemetery. That will was witnessed by Henry S. Osborne and Robert F. Pettibone, lawyers, and Elizabeth Melitor, a stenographer in the law office. The two codicils were witnessed by the same parties, except Mr. Pettibone who was absent from Chicago. The will in controversy was dated March 26, 1913, and was witnessed by Robert F. Pettibone and Elizabeth Melitor. This will provided for the following annuities: Laura H. McKaig, \$300; Laura E. Boteler, \$200; Mary A. Cornish, \$800; Mrs. Hamel, \$500; Mrs. Sans, \$200, and contained the same provision excluding his nephew William C. Boteler and his niece Mary Boteler Beckley, as in the first will. To this will a codicil was added, January 6, 1914, in which the testator signed his name by mark. It was witnessed by Elizabeth Melitor and Robert F. Pettibone. In this codicil it is stated that since the execution of the will Mrs. Hamel had died, and her annuity was added to Mrs. Cornish's \$800, giving the latter \$1300. Other bequests were made to St. Paul's Reformed Episcopal Church, and to the trustees of Scroll & Key Society of Yale College, New Haven, Connecticut, and there was a like provision excluding his nephew William C. Boteler and his niece Mary Boteler Beckley. The proponents called sixteen witnesses who testified that the testator was of sound mind. The complainants called seven witnesses, some of whom testified that in their opinion the testator was of unsound mind, but an analysis of their testimony discloses the fact that there was very little basis, if any, for their opinion. The testimony, however, on behalf of the proponents, which covered a considerable space of time, leads any unbiased

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mind to the irresistible conclusion that the testator was not of unsound mind, but on the contrary that his mind was always sound, and that at the time he executed the will and codicil he clearly understood who were the natural objects of his bounty, the nature and extent of his property, and the consequence and effect of the act of executing his will and codicil. An analysis of the testimony of these witnesses and other evidence in the case cannot be made within the limits of this opinion, but we are clear that no verdict could stand except one that upholds the will and codicil.

Complaint is made of the giving and refusing of instructions, and while there may be some inaccuracies, we think on the whole the issues were fairly presented. But in no event should they work a reversal of the decree. Where upon a consideration of all the evidence this court is of the opinion that substantial justice has been done, and that the instructions, even if some of them should be considered erroneous, could not under the circumstances have affected the result, the decree will not be reversed. Ward v. Ford, 257 Ill. 341.

Complaint is also made of the admission in evidence of five letters, three of them written by Mrs. Cornish in the name of the testator, and which were addressed to the testator's cousin, Mr. Pleasants, at Baltimore, and received by him, and two by the latter to the testator, which were found among the effects of the testator after his death. The objection is that there was no evidence to show that the testator wrote any of the three letters or that he ever knew of them or their contents, or that he ever received or knew

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of the two letters or their contents. During the period covered by these letters the testator was almost blind and could not read. The evidence shows that Mrs. Cornish often took dictation for him; that she signed his name to letters and her own name, showing that she had written them as appeared from the three letters in question. It also appears that the testator acted upon and did some of the things mentioned in the letters. The three letters themselves give evidence that they were the product of the testator's mind. This appears from matters stated in them which he alone could know and from the style of the letters which was unmistakably of the same character as other letters admitted to have been written by him. There was nothing in the letters indicating that anything was being concealed, and we think upon a careful consideration, they were admissible in evidence, and in no event would their admission cause a reversal of this case.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

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156 - 24076

BEARDSLEE CHANDELIER MFG. CO.,
Assignee of the CHICAGO CHANDELIER & BRONZE CO.,

Appellee.

vs.

T. W. PARSONS.

Appellant.

213 I.A. 653

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover \$291.90, the balance due for furnishing and installing certain electric and gas fixtures in defendant's apartment building. The case was tried before the court without a jury; there was a finding and judgment in favor of plaintiff for \$278.50, to reverse which defendant prosecutes this appeal.

The record discloses that the Chicago Chandelier & Bronze Co. entered into a contract with the defendant to furnish and install in the defendant's six flat building electric light and gas fixtures. The work was begun about September 15, 1916, and completed about the 15th of the following December. The defendant made payments on account aggregating \$1000 and refused to pay the balance for the reason, as he claimed, that the fixtures, when installed and afterwards, were tarnished and inferior. Plaintiff admitted that the fixtures when installed were not in the condition they should have been, but claimed that subsequently some of them were removed and the defects cured and reinstalled and the balance

The record discloses that the Chicago Chamberlain & Co., entered into a contract with the defendant to install and install in the defendant's six first building electric light and power system. The bill was \$100.00.

In 1926, and completed about the 1st of the following month. The defendant made payment on account of \$50.00 and refused to pay the balance for the reason, as he claimed, that the fixtures, when installed and afterwards were furnished and inferior. Plaintiff admitted that the fixtures when installed were not in the condition they should have been, but claimed that subsequently some of them were removed and the balance owed and reinstalled and the balance

of them were also put in first class condition. That they were put in such condition the defendant denies, and insists that it would cost more than the balance due to put the fixtures in the condition they should have been. The only point then in controversy is whether the fixtures after they were installed were put in first class condition by the plaintiff.

Six witnesses testified on behalf of the defendant and four for the plaintiff. The defendant testified that the fixtures were tarnished when put in the apartments; that part of them were returned to plaintiff who endeavored to put them in good condition; that they were again installed; that the fixtures not returned were also gone over in an endeavor to put them in good condition, but all were still tarnished. The architect who gave testimony tending to show that he was qualified to testify as to such fixtures, testified that the fixtures were tarnished, and that they were improperly lacquered. Armin Lurz, who was qualified to pass on their condition as shown by his previous experience, testified he assembled for the contractor the fixtures prior to their delivery, and that they were streaked with black on the silver; that there were brush marks on them, and that they were tarnished. George Christensen, who was in the employ of the contractor as a fixture hanger, testified that he installed the fixtures in the building; that he afterwards removed some of them because they were tarnished; that when they were delivered he found them tarnished and informed the contractor of the fact, and was instructed to return them to the factory, which was done. He also testified that after they were returned to the building he complained to the contractors of the finish but was in-

structed to go ahead and put them up, which he did. He testified that the fixtures were defective and that the defect had not been removed. Fred J. Schuett, who was secretary and manager of the contractor, saw the fixtures and found them streaked. After the center fixtures had been sent to the factory for refinishing, he says their condition as to workmanship and finish was fair with the exception of the bottom bowl of the fixtures in the living rooms. He further testified that other of the fixtures were black streaked and tarnished and were not satisfactory. John B. Warren, who was qualified on such fixtures, testified that they were tarnished.

On behalf of the plaintiff George W. Kaiser, who was in the employ of the contractor at the time the work was done, testified that he was not as familiar with the fixtures as Mr. Schuett the Manager, when they were installed; that afterwards defendant complained to him about the finish; that he went out to the building and found something wrong with the lacquer; that he told the defendant that if he would send back the fixtures they would fix them up satisfactorily, and that he did not see them afterwards. Charles E. Schaaf testified that in January after the fixtures were installed he went out to the building and looked them over; that he found finger marks and paint marks on the fixtures and the lacquer was affected; that he and another man spent two days in removing the finger marks and paint and relacquered the fixtures, and that they were in perfect condition when he left them. William M. Ketcham testified that he was a lacquerer by trade and had been in that business for twenty-four years; that he saw the fixtures in

the factory and in January after they were installed in the building; that he washed off the lacquer and rubbed up the fixtures; that he relacquered them with a brush; that when he left the fixtures he did "not think they looked very bad." On cross-examination he said that when he got through relacquering the fixtures in January they were in first class condition. J. L. Gefinger, superintendent of the plaintiff, testified that he had been in the fixture business for twenty years; that he was at the building after the fixtures were installed on account of complaint of the defendant and tried to make them satisfactory; that he told the defendant that plaintiff would put the fixtures in good shape; that he sent workmen out there two or three days to go over them; that the men were competent workmen, but he did not see the fixtures after they were refinished. He further testified that the trouble with the fixtures in the first place was that they were not properly handled when they were assembled and installed in the building.

From the foregoing it appears that only two of the witnesses who testified on behalf of the plaintiff saw the fixtures after they were finally refinished, and we think a careful consideration of their testimony shows that the fixtures were not in good condition when the work was finally completed. Upon a careful consideration of all the evidence in the record, we are clearly of the opinion that the finding and judgment of the trial court is against the manifest weight of the evidence. And, since the evidence shows that it would cost more than the balance claimed to be due to put the fixtures in perfect condition, the plaintiff is not entitled to recover, and the judgment of the Municipal Court of Chicago

is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as an ultimate fact that the fixtures in controversy were not in good condition when they were installed in building and that the defect was not subsequently cured.

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Disseminating research is not sufficient

165 - 24086

GER-LAUBENHEIMER CO.,
a corporation,

Appellant,

vs.

LOUISVILLE & NASHVILLE RAIL-
ROAD CO.,

Appellee.

213 I.A. 653

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover \$316.10 as damages resulting from delay in the shipment of a car of bananas over the defendant's line. The case was tried before the court without a jury; there was a finding and judgment in favor of defendant to reverse which plaintiff prosecutes this appeal. The record is very much confused. Counsel for plaintiff states in his brief that the only question in dispute was the time of the arrival of the car of bananas at Rome, Georgia.

The record discloses that plaintiff at Mobile, Alabama, loaded a car of bananas in one of the defendant's cars, and on that date defendant issued a bill of lading, whereby it agreed to transport the car to Rome, Georgia. The evidence introduced on behalf of the plaintiff tended to show that complaint was made to the railroad company that there was a delay in the transportation of the car, and that when it arrived at Rome the bananas were frosted and of little value. On the other side the defendant introduced

evidence that tended to show there was no delay in the transportation of the bananas; that immediately upon the car's arrival at Rome, it was delivered to plaintiff, but that the plaintiff delayed two or three days before the bananas were unloaded and there was further evidence introduced on behalf of the defendant that no complaint was made by the plaintiff that bananas were damaged.

Plaintiff complains of the ruling of the court on the admission and exclusion of evidence. All of the testimony was by depositions, and on the trial a witness for the plaintiff in answer to the question as to when the car arrived in Rome, said: "According to the records the car was shipped November 27, 1912, and arrived in Rome, Georgia, December 4, 1912." Defendant's counsel objected to this on the ground that the record was the best evidence. The objection was sustained and the answer stricken out. It is clear that the ruling of the court was correct. The witness was then asked: "Q. How long after the arrival of the car at Rome, did you inspect the same? A. Immediately." This answer on objection was stricken out, for the reason that the date of arrival had not appeared. Where the only testimony of the witness in fixing the date of arrival was such as was shown by the record, and that was stricken out, manifestly no time of arrival was fixed, and to say that he immediately inspected the car after arrival in such case is meaningless.

Counsel for plaintiff say, as we understand it, that the record referred to by the witness was a freight bill showing payment of the freight. This bill was intro-

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THE NATIONAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

duced in evidence, and it appears that it is a bill for the freight presented to the consignee of the bananas at Rome, and is dated December 4th and was paid on the same day, and it is argued that this indicates that the car arrived on that day. It also appears that a way-bill for the car was issued at Inman, Georgia, which appears to be an intermediate point between Mobile and Rome, and the date of the way-bill, as given in the margin of the freight bill is December 2nd, and it is argued that the payment of the freight on December 4th indicates that the car arrived in Rome on that day, and that the date of the way-bill shows that the car on December 2nd had not arrived at Rome. The latter contention seems to have been made for the first time in this court. But in no event can we take judicial notice that the day the freight was paid was the day the car arrived, nor that the car was at Inman, Georgia, at the time the way-bill was issued at that place. We think neither of these facts warrant the conclusion that car arrived at Rome on December 4th.

On behalf of the defendant the depositions of two witnesses were read, and at the time they were taken no one was present representing the plaintiff. Counsel for plaintiff, after the depositions were read, made a motion to strike out certain questions and answers. The motion was overruled. The first witness testified "Q. Was a car delivered by the Southern Railroad Company to Stamps & Company on or about November 29, 1912, if so, describe the car by initials and number? A. Car THE 30456" (that means refrigerating car). "THE Car 30456 delivered to Stamps & Company afternoon of November 29, 1912." And another witness testified: "Q. Was a car delivered by the Southern Railway Company on or about November 29, 1912, on the

team track at Rome, Georgia? A. It was. Q. If so, state to whom this car was delivered, describe the car by initial and number? A. Car TRE 30456, delivered to Stamps & Company afternoon of November 29, 1912." The objection urged on the trial was that plaintiff was not represented at the taking of the depositions; that the answers were conclusions in stating that the car was delivered to the consignee. We think the objection was too late and should have been made when the depositions were taken, or at the latest, when they were filed a motion to suppress should have been made. These two witnesses also testified that on December 2, 1912, after most of the bananas were unloaded, a new bill of lading was issued for the transportation of the balance of the bananas in the same car from Rome to Dalton, Georgia.

From the foregoing it appears that plaintiff's contention was that the car arrived in Rome on the 3rd or 4th of December, and the only competent proof in the record is that on one of those dates they opened the car. On the other hand two witnesses testified that the car arrived on the afternoon of November 29th, and was delivered at the same time. It is conceded that if the car arrived at Rome on the 29th there was no delay in the transportation. Since plaintiff bases his claim on the fact of delay in transportation, he has not proved his case, for his evidence only tends to show the date the car was opened. Moreover there is no evidence of any kind that delay, if any, caused the damages claimed.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

[illegible]

175 - 24096

MORRIS GOLDBASSER, HYMAN GOLDBASSER
and HARRY GOLDBASSER, Trading as
M. Goldwasser & Sons,

Appellees,

vs.

ABRAHAM SIEGEL and MAX SIEGEL,
Trading as Siegel Bros.,

Appellants.

242a
213 I.A. 654

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

Plaintiffs brought suit against the defendants to
recover the purchase price of certain clothing sold by plain-
tiffs to defendants. There was a finding and judgment in
favor of plaintiffs for the amount of their claim, \$473.80,
to reverse which defendants prosecute this appeal.

The record discloses that plaintiffs were manufactur-
ers of clothing in New York City, and the defendants were in the
business of selling clothing in Chicago; that a representative
of the defendants called on plaintiffs at their New York
place of business and purchased the bill of goods in question.
A written memorandum in duplicate was made showing the style,
color, price, etc. The sale was by sample, the plaintiffs exhibit-
ing samples of the goods to defendants' representative. After-
wards plaintiffs manufactured the goods and sent them to the
defendants. The defendants refused to accept them, saying
that the material was not the same as the samples submitted,
but was much inferior to it. The only point in controversy
in this court is whether the material furnished was of the

STAIRS

kind and quality of the samples. We have carefully examined all the evidence in the record. Two witnesses testified by deposition on behalf of the plaintiffs that the material furnished was the same as that of the samples. The representative of the defendants who took the order and who examined the goods in New York, testified that the material in the goods was greatly inferior to the material in the samples submitted; that part of the agreement was that the materials out of which the goods were to be made was to be made by Forstman & Hoffman, manufacturers of clothing material, and that the material furnished was not made by these parties. On behalf of the plaintiffs the testimony was that there was no such agreement, and that no particular manufacturer was mentioned. The itemized bill of goods does not state that the material was to be manufactured by any particular person or persons, and upon a consideration of all the evidence in the record, we are unable to say that the finding of the trial court in favor of the plaintiffs is manifestly against the weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THE UNIVERSITY OF CHICAGO PRESS

583 - 23928

HENRY PETER LARSEN,

Appellee.

vs.

CHICAGO RAILWAYS COMPANY,

Appellant.

243a
213 I.A. 654

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Henry Peter Larsen, having been injured getting off a street car belonging to the defendant, Chicago Railways Company, brought suit for damages and recovered a verdict and judgment in the sum of \$1500.00. This appeal is taken therefrom.

The declaration alleged that on January 13, 1914, the plaintiff boarded an East bound car of the defendant at the intersection of Forty-eighth street and North avenue and became a passenger thereon, his destination being Whipple street; that it became the duty of the defendant when the car arrived at the intersection of Whipple street "to give the plaintiff an opportunity to safely alight therefrom and then and there to stop the said street car a reasonable time to enable the plaintiff so to alight therefrom safely as aforesaid. Yet the defendant did not regard its duty or use due care in that behalf but on the contrary thereof upon the arrival of the street car at the intersection of North avenue and Whipple street * * * and while the plain-

tiff with all due care and diligence was then and there about to alight therefrom, the defendant carelessly and negligently caused the said train to be suddenly and violently started and moved and thereby the plaintiff was then and there thrown with great force and violence from the said car to and upon the ground there."

The defendant pleaded the general issue.

The accident occurred in the neighborhood of six o'clock on the evening of January 13, 1914, at North avenue and Whipple street. North avenue runs east and west and Whipple street runs into North avenue from the north but not from the south. On the south is the boundary line of Humbolt Park. The street where the plaintiff got off was paved with asphalt and at the time, was slippery from ice and snow.

The plaintiff was a man sixty years of age and an employee of Pettibone-Mulliken Company, makers of railway supplies, whose works were located near North avenue and Forty-seventh street. After finishing his work on January 13th, 1914, the plaintiff together with one Newberg and some other employees of the factory, got on the car at North avenue and Kilpatrick street. The plaintiff and Newberg took seats in about the center of the car. The evidence of Newberg is to the effect that when the car got past Albany avenue he pressed the signal button and that the plaintiff walked to the rear platform; that the car stopped for about a second at the west side of Whipple street and then started up again; that before the car stopped the plaintiff walked to the rear platform; that

THE UNIVERSITY OF CHICAGO

when the car stopped the plaintiff was on the rear platform right by the conductor; that he did not see him step down; that the car started up slowly and went about half way across the street and stopped again.

The evidence of the plaintiff, who testified through an interpreter, is to the effect that a little before they got to Whipple street he told Newberg to press the button and that he did so; that when they came to Whipple street he got off and "just when he stepped off the car he was knocked down from the force of the car"; that the car started before he got on the ground; that the car was stopped when he started to get off and started again while he was getting off.

On behalf of the defendant the conductor, Moscow, and two passengers who were on the rear platform, Burandt and Blank, testified that the plaintiff got off the car as it was stopping and that the car only ran a few feet after the plaintiff stepped from it and fell, and that the car made only one stop at the scene of the accident.

The defendant contends that the plaintiff did not prove the negligence as alleged in the declaration; that the clear weight of the evidence shows that he voluntarily alighted from the car while it was moving and coming to a stop, and that "the proximate cause of plaintiff's injury was his failure to exercise ordinary care for his own safety in alighting from the car under such circumstances."

The chief question is whether the testimony of the plaintiff and Newberg, or that of the defendant's witnesses, is to be believed. As the record comes before us the evidence

that the day changed the plaintiff was on the way, looking
like a broken conductor; that he did not go down
and the car started up slowly and went about half way
before the lights were turned on.

The evidence of the plaintiff, as mentioned

above, as interpreted, is to the effect that a little before
11:00 p.m. the witness at the hotel saw the car go
down and back up and that when they came to the light
the car was not lit and that when he stepped off the car he was
knocked down from the force of the car; that the car started
back up and the witness saw the car was lit up when he
stepped on and started again while he was getting off.
The witness at the hotel saw the conductor, however,
and the witness saw him on the rear platform, however,
and the witness testified that the plaintiff got off the car and
it was stopping and that the car only ran a few feet after
the plaintiff stepped on it and fell, and that the car
went off the end of the track of the hotel.

The defendant contends that the plaintiff did not

give the negligence as alleged in the declaration; that the
evidence of the evidence shows that he voluntarily stepped
on the car while it was moving and coming to a stop, and that
the negligence of the plaintiff's injury was his failure to
exercise ordinary care and that the injury is resulting from
the car under such circumstances.

The chief question is whether the testimony of the
plaintiff and the witness, as part of the defendant's witnesses,
is to be believed. As the record shows before us the evidence

of the conductor and motorman and the two passengers, Burandt and Blank, seems quite strong, and yet it may be that at the trial as the evidence was presented to the jury it was only reasonable to give credit to the evidence introduced on behalf of the plaintiff. Upon a careful analysis of the evidence we do not feel justified in concluding that the verdict was manifestly against the weight of the evidence.

It is further contended by the defendant that the trial court should have granted a new trial on the ground that the plaintiff failed to exercise ordinary care for his own safety. It was the theory, however, of the plaintiff's case that his fall was caused by the car starting up when he was in the act of alighting and that the evidence sufficiently established that fact. The question of contributory negligence - having in mind the evidence on behalf of the plaintiff as to how the accident happened and which the jury evidently believed and which we think is sufficient - does not arise.

Further, it was contended that the judgment should be reversed on the ground that counsel for the plaintiff in his argument to the jury on these different occasions made certain prejudicial and improper remarks. There is no doubt that the remarks referred to were improper, but after carefully considering them, we are of the opinion that, under the circumstances, they do not justify a reversal.

There being no material error in the record the judgment is affirmed.

AFFIRMED.

118 - 24037

A. REIN,

Appellee.

vs.

RICHARD J. MCCORMICK, On
appeal of John A. McCormick,
individually and as executor
of the last will and testament
of Margaret McCormick, deceased.

Appellants.

*Old Briefs
See 4425*
213 I.A. 654

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

213 App. 33

MR. JUSTICE TAYLOR delivered the opinion of the
court.

On March 18, 1919, on motion of the appellant
this cause and general number 24036 were consolidated
"on one set of abstracts and briefs to be filed in case
No. 24036". It follows, therefore, that the opinion in
general number 24036 (to which reference is made) is
decisive of the instant case. The judgment is accordingly
reversed and the cause remanded.

REVERSED AND REMANDED.

28 I.A. 654

REVEREND AND HONORABLE

181 - 24102

GENEVIEVE M. GOODWILLIE,

Appellee,

vs.

T. G. WARDEN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

213 I.A. 654

MR. JUSTICE TAYLOR delivered the opinion of the court.

An electric automobile belonging to the plaintiff having been damaged by an automobile belonging to the defendant and the latter having thereafter, as claimed by the plaintiff, promised to pay the cost of repairs, the plaintiff brought suit and recovered a judgment in the trial court - without a jury - in the sum of \$302.25 and costs. From that judgment this appeal is taken.

The plaintiff's statement of claim alleges that:

"Defendant was possessed of a certain touring automobile which was then and there being driven by the chauffeur for said defendant, by and in behalf of said defendant, and was carelessly, wrongfully and recklessly driven and run into the electric automobile of the plaintiff, damaging the same; that plaintiff thereupon called upon the said defendant and said defendant informed the plaintiff that the said touring car so driven by his chauffeur, belonged to him and then and there promised to pay for the damage to plaintiff's machine, and thereupon requested the plaintiff to deliver the said machine to the Woods Motor Vehicle Company and to have the same repaired and to obtain a bill for such repairs and that he the said defendant would pay the expense of such repairs; that the reasonable value of such repairs is Three Hundred Two and 25/100 (\$302.25) Dollars, for which defendant is liable to plaintiff."

ST. ALBANS

The defendant in his affidavit of merits alleges that the plaintiff's automobile was not properly lighted; that it was damaged by an automobile of a third party, and denies that any automobile belonging to him was then and there driven by his chauffeur for him, and denies "that any automobile belonging to him was then and there carelessly, wrongfully and recklessly driven and run into the electric automobile of the plaintiff" and denies that he promised, as alleged in the statement of claim, to pay for the damages to plaintiff's machine or any part of said damage.

On February 27, 1917, about eight o'clock P.M., the plaintiff Genevieve Goodwillie, the owner of an electric automobile, left the machine standing in front of the Mallers building, near 44th and Drexel, "on the right side facing South" and very close to the curbing, with the rear and side lights lighted. Shortly afterwards one Cupp, the chauffeur of the defendant, T. G. Warden, driving a car which had been bought and was licensed by the defendant, ran into the electric, turning it around in the street and seriously damaging it. The chauffeur driving the limousine immediately after the collision started South and apparently undertook to get away without being discovered. The back of the electric was smashed in and the batteries were scattered about the street, the steering rod was bent and there was other damage. The plaintiff called up the Fashion Garage at 51st Street and Cottage Grove Avenue, where she was accustomed to keep her car, and requested them to get it and take it to that garage, which they did. Three or four days afterwards the plaintiff went to the office of the defendant and had a talk with him in regard to the accident.

[illegible][illegible]

The evidence of the plaintiff is to the effect that the defendant told her "that he did'nt wish the Fashion Garage Company to fix it because they charge too much"; that "the best place to put it was in the Woods where it had been made and to have it fixed and send the bill to him and he would pay it"; that she then had the car sent from the Fashion Garage to the Woods place; that it was put in first class running order; that the repairs cost \$302.25; that the defendant then said he would not pay it; that the defendant was very deaf and she had a hard time making him understand what she said; that the defendant had an ear tube or something of that kind. The evidence of one Foley is that in conversation with the defendant's chauffeur after the accident the latter said that "he had been coming from a funeral or something and had a lot of flowers in the front of his car in the driver's compartment, as the flowers had fallen off the seat and he was leaning down to pick up those flowers * * * he lost control of the car and it smashed into the machine." The evidence of the witness Warden, the defendant, is that he owned the limousine; that it was used entirely for his wife's driving; that during the week of February 27, 1917, he did not give Gupp, the chauffeur, any orders or have any conversation with him; that he did not know anything of the collision until the next day; that a few days afterwards the plaintiff came to his office to see him; that as he could not hear her he went out and brought in a clerk, Mr. Pollard; that he did not know what she said; that he did not hear her; that he did not tell her at that time to send her car to the Woods Company and have the bill sent to him and that he would pay it; that the Woods Company sent him an estimate and a bill afterwards; that he went over the next day to the Fashion

Garage to see the electric machine, which he found was all smashed up; that he never had any work done at the Fashion Garage; that he does not know how it happened that the bill from the Woods people came to him.

Pollard, a witness for the defendant and who was the latter's bookkeeper, testified that when the plaintiff called he took her into the defendant's office and left her and that the defendant came out and asked him to step into his office and find out who the lady was and what she wanted; that the plaintiff then told him that the garage people would not make any repairs on her car without authority for the payment of the expenses; that he repeated that to the defendant; that the defendant then said to the plaintiff "I have nothing to do with the repairs to your car"; that the defendant did not say anything about having the car sent to the Woods Electric Co and having the bill sent to him and that he would pay it. On cross examination, however, he said that the name of the Fashion Garage and the Woods Electric Co. might have been mentioned. The evidence of the witness Byrne is to the effect that he was present when the plaintiff and Pollard came out of the defendant's office; that the plaintiff then told him that the defendant had refused to have anything to do with the repairs of her car.

On February 5, 1918, the trial judge, without a jury, found the issues against the defendant and entered judgment in favor of the plaintiff and against the defendant for damages in the sum of \$302.25, together with the costs.

It is contended by the defendant; (1) that he was not liable in tort, and that as to the oral contract, the evi-

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dence fails.

We are of the opinion that the evidence sufficiently shows that the defendant was liable for the tortious act of the chauffeur. The evidence is overwhelming that the chauffeur carelessly, wrongfully and recklessly, as set forth in the statement of claim, collided with the electric automobile of the plaintiff and also that as a result the plaintiff's automobile was damaged to the extent of the amount of the judgment. Defendant claims that the automobile driven by his chauffeur was used entirely for his wife's purposes; that during the week within which the damage was done he did not give the chauffeur any orders or have any conversation with him, and that he did not know anything of the collision until the next day.

The plaintiff, having proved that the automobile which did the damage belonged to the defendant and was driven by his chauffeur, and that the injury was caused by careless and reckless driving on the part of the chauffeur, established a prima facie case. If the defendant desired to show that the collision took place while the chauffeur was driving for some purpose that did not pertain to the particular duties of his employment, he was bound to introduce sufficient evidence to overcome the presumption which arises from the admitted fact of ownership and employment of the chauffeur. If a chauffeur driving an automobile is not acting for the owner the latter in order to take advantage of that fact must make sufficient proof thereof in order to overcome the normal presumption which arises by reason of ownership and employment. Berry on The Law of Automobiles, Section 615; Marshall v. Taylor, 168 Mo. App. 240; Shamp v. Lambert, 142

Exhibit 1

It is the opinion of the undersigned that the following is a true and correct copy of the original as shown to the undersigned by the defendant.

That the defendant was liable for the injuries and

damages sustained by the plaintiff as a result of the collision.

That the defendant was negligent in the manner in which he

drove his automobile, and that such negligence was the proximate

cause of the injuries and damages sustained by the plaintiff.

That the defendant was negligent in the manner in which he

drove his automobile, and that such negligence was the proximate

cause of the injuries and damages sustained by the plaintiff.

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drove his automobile, and that such negligence was the proximate

cause of the injuries and damages sustained by the plaintiff.

That the defendant was negligent in the manner in which he

drove his automobile, and that such negligence was the proximate

cause of the injuries and damages sustained by the plaintiff.

That the defendant was negligent in the manner in which he

No. App. 575; Mackey v. P. & W. C. Traction Co., 227 Pa. St. 433.

We are of the opinion that the evidence sufficiently shows that Cupp, the chauffeur, was employed by the defendant; that the automobile which he was driving belonged to the defendant, and that there is no evidence of importance even tending to show that the chauffeur at the time of the collision was not driving pursuant to the duties of his employment.

As to the claim that the defendant after the collision and the injury to the plaintiff's automobile orally undertook to pay the cost of repairs, that of course becomes immaterial.

The statement of claim sets up two causes of action; one in tort and one based on a promise to pay. The affidavit of merits denies both and is in the nature of a plea of the general issue, and also a plea in confession and avoidance; no objection, however, has been made on that ground, and as the tort was proved as alleged the plaintiff was entitled to recover.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

240 - 24165

CHARLES DIENSKER,

Appellee,

vs.

THOMAS WAKEFIELD and AGNES
WAKEFIELD,

Appellants.

2131.A. 654

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On August 4, 1916, the plaintiff, Charles Diessner, brought suit in the County Court on a promissory note in the sum of \$300.00. The defendant pleaded the general issue and payment. On October 22, 1917 in the County Court the case was called for trial and a continuance was requested by one Cohen the attorney of record for the defendant. The reason given was that it was impossible to get certain witnesses. The attorney for the plaintiff objected on the ground that the case had been on the call for a week or more. In the discussion of the motion the court said "it has been called practically every day for several days. As I understand it there wasn't any intimation here this morning at the time it was indicated by the court that this case would be set." Further, upon the statement of Mr. Cohen that he had a perfectly good defense and all he wished was three or four days more time, the court then said, "you may have the best defense in the world but now is the time to put in the defense, we would not have any assurance of transacting any business if cases should be tried in this manner." The trial judge, then,

2181.A. 624

Page 2 of 2

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after announcing that it was the practice of the court to extend the utmost indulgence, stated that it would be "absolutely unreasonable" to grant a continuance and ordered that the cause be disposed of then; accordingly, a jury was empanelled. Cohen, meanwhile, went to the telephone and then returned and stated that he had communicated with Stein and the latter said that his wife was taken to the hospital the week before; that although he, Cohen, was the attorney of record he was not the attorney for the defendant; that he, himself, knew very little, if anything, about the case.

The court then ordered the cause to proceed, and the promissory note and other evidence was then introduced, showing that there was due the plaintiff the sum of \$411.50. The jury were thereupon instructed to render a verdict in that sum, which they did; whereupon judgment was entered against the defendant and subsequently this appeal was taken therefrom.

On October 30, 1917, notice was served upon the attorney for the plaintiff that on the following day he would move that the default be vacated and set aside and the cause set down for trial. With that notice there was served affidavits of Myer J. Stein and Maurice G. Cohen, the latter being the attorney of record.

The affidavit of Myer J. Stein - who was not the attorney of record - sets up, among other things, that he was "the counsel for the defendant"; that the cause was called for trial for the first time on October 22, 1917; that "at the time when this case was on the calendar and for almost the entire week", he was unable to be in court because of the serious illness of his wife, and was not only absent from his office on that account but would have been unable during

44/33 209

After examining the evidence of the witnesses, the jury found that the defendant was guilty of the crime charged. The jury returned a verdict of guilty, and the court sentenced the defendant to the State Prison for a term of years.

The court then ordered the cause to proceed, and the

his action on this account but would have been unable during
certain periods at intervals, and was not only absent from
office work, he was unable to be in court because of the
fact that this case was on the calendar and for almost the
entire time of the trial from October 22, 1917, until the
verdict was returned for the defendant; that the court was called
away to court - kept up, among other things, that he
was "in court" at 10:00 A. M. - who was not in
the building of the court.

that week to have undertaken the trial of any case; that the defendant was one of his clients and at the time the suit was instituted one Maurice G. Cohen, an attorney in his office, filed on his, Myer J. Stein's, behalf, and in his, (Cohen's) own name, an appearance as attorney for the defendant and did so with his, Stein's, consent; that when the cause was called for trial he, Stein, asked Cohen to appear, and ask for a continuance; that the defendant has a good and substantial defense on the merits of the action; that as the cause was called for trial for the first time and no continuance had previously been asked or given, the defendant requests that the judgment be vacated and set aside.

The affidavit of Maurice G. Cohen sets forth, substantially, that at the time of the commencement of the action he was asked by Stein to file an appearance on his behalf; that he was not engaged as attorney to try the issues; that when the cause was called to trial on October 22, 1917, he was in court and asked for a continuance; that he was diligent in taking care of said case "but on account of the facts heretofore mentioned in the affidavit of Myer J. Stein he was unable to be ready for trial"; that the defendant has a good and meritorious defense and asks that the judgment by default be vacated and set aside. On November 17, 1917, the motion to vacate was heard and denied.

The application for the continuance was not in conformity with the requirements of section 62, chapter 110, Murd's Revised Statutes. Neither diligence, nor what the evidence consisted of nor the place of residence of witnesses was shown. The question then remains, did the trial judge abuse his discretion in refusing subsequently to vacate the

that was in the deposition the trial of any case; that the
deposition was not at his office and at the time the writ
was issued and Justice G. Cohen, an attorney in his office,
lived in New York City, and he was, (Cohen's)
and was, an attorney for the defendant and his
counsel, and that when the case was called
for trial in New York, Justice Cohen appeared, and was for a
moment, and the defendant had a good and substantial defense as
the trial of the action; that on the issue was called for trial
the trial was not continued and previously been called
at New York, the defendant requests that the judgment be vacated
and set aside.

The affidavit of Justice G. Cohen sets forth, sub-
stantially, that at the time of the commencement of the
action he was called by writ to file an appearance on his
behalf; that he was not engaged as attorney to try the
case; that when the case was called to trial on October
12, 1917, he was in court and asked for a continuance; that
he was diligent in taking care of said case but on account
of the facts heretofore mentioned in the affidavit of New
York, he was unable to be ready for trial; that the de-
fendant has a good and substantial defense and asks that the
judgment by default be vacated and set aside. On November
17, 1917, the motion to vacate was heard and denied.

The application for the continuance was not in
conformity with the requirements of section 82, chapter 119,
and a further statement. Further diligence, now when the
evidence obtained it was the place of residence of witness
was shown. The question then remains, did the trial judge
show his discretion in refusing to vacate the

judgment? The attorney, who was actually the attorney of record for the defendant, set up in his affidavit that he, himself, entered the appearance of the defendant merely for the convenience of one Stein who was at that time the actual attorney in fact for the defendant and that Stein, owing to the illness of his wife, was unable to appear in court. The cause had been on the trial call for more than a week. In neither of the supporting affidavits are there any detailed representations of fact showing the nature and character of the alleged meritorious defense. It is the law that, upon an application to vacate an ex parte judgment the supporting affidavits shall set forth such facts that, if proven, will justify the inference, that there is a meritorious defense. Crossman v. Wahlleben, 90 Ill. 537. In the instant case the affidavit merely stated the conclusion that the defendant had a meritorious defense. Obviously that is insufficient. Considering all the circumstances and having in mind the legal principles applicable thereto and mindful of the indulgence that should be shown, we are of the opinion that the trial court was justified in refusing the continuance and in entering and refusing to vacate the judgment.

Finding no material error in the record, the judgment is affirmed.

AFFIRMED.

121 - 24040

ST. JOSEPHO SUZIEDOTINIO DRANGYSTIS & CO.
a corporation,

Plaintiff in Error,

vs.

JOSEPH RIBIKOS AND LEONORIUS NAUSIEDAS,

Defendants in Error.

213 I.A. 655

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action by the plaintiff benefit society against the two defendants who were sureties on a bond which had been given by one John Petkus, as treasurer of the society, in which the plaintiff sought to recover \$695.65, the amount for which the said Petkus had failed to account, as such treasurer. The issues were presented to the court without a jury. The trial court found the issues for the defendant and entered judgment against the plaintiff for costs and from that judgment the plaintiff has appealed.

John Petkus, the principal in the bond sued upon, had succeeded himself as the treasurer of the plaintiff society for several terms. The defendants were sureties upon his bond during the last one of those terms. It is their contention, that during his last term as treasurer, Petkus had paid out for the benefit of the society, more than he had collected as its treasurer during that period and that his defalcation, if any, had occurred previous to the beginning of his last term as treasurer and that inasmuch as the bond on which

2181.A.655

There was an article by the plaintiff's society
in the New York Times and other papers on a bond which
was given to the plaintiff's society, on the ground of the society's
claim to the plaintiff's society to recover \$100.00, the amount
of the bond which the plaintiff's society had failed to account, as such
amount, for the plaintiff's society was presented to the court without
a trial, the court found the amount for the plaintiff's society
and entered judgment against the plaintiff's society for costs and fees
and the plaintiff's society has appealed.

On appeal, the plaintiff's society has
presented itself as the plaintiff of the plaintiff's society
for the purpose of the plaintiff's society. The defendant's society has also been
presented the fact one of these things. It is a fact of the plaintiff's society
that during the last term of the plaintiff's society, the plaintiff's society had paid out
for the purpose of the plaintiff's society, more than he had delivered
as the plaintiff's society during that period and that the plaintiff's society
it may, has occurred problems as the plaintiff's society of the fact
that as defendant and that plaintiff on the bond on which

they were sureties was given at the beginning of his last term and covered only that period, they are not liable.

Counsel for the defendants insisted that it was incumbent upon the plaintiff as a part of its prima facie case to present evidence tending to show that the alleged defalcation occurred during the period covered by the bond on which the defendants were sureties. This is not the law. In a suit against the obligors on such a bond, the fact that the defalcation occurred previous to the beginning of the current term for which the bond was given, if such be the fact, is a matter of defense and the defendants have the burden of establishing it. Stern v. The People, 96 Ill. 475, 480.

Such a defense, however, would not defeat the action if the treasurer's accounts, at the close of the term preceding the one in connection with which the bond in suit was given, were to the effect that he then had on hand such funds as he was properly chargeable with, and he made a report to the society and an accounting accordingly, such report and accounting being contrary to the fact. Bartlett v. Wheeler, 195 Ill. 445, 455; Stern v. The People, 96 Ill. 475, 480; Moreley v. Town of Matamora, 78 Ill. 394; Roper v. Sangamon Lodge, 91 Ill. 518.

In Stern v. The People, the court refers to the case Moreley v. Town of Matamora, 78 Ill. 394, and distinguishes it from that case saying, that in the Moreley case, "the defaulting officer made his report at the end of his first term, showing a definite sum remaining in his hands as his own successor. The report was approved by the auditing board, whose duty it was to examine the same, and the sureties on the second bond had notice of what the record disclosed in that respect. It was

and was not given as the beginning of his term
and covered only that period, but the defendant.

Concededly, the defendant intended that it was

intended upon the plaintiff as a part of the giving of the
the general evidence tending to show that the alleged defendant

was intended during the period covered by the bond on which
the defendant was executed. This is not the law. In a suit

against the obligor on such a bond, the fact that the de-

fendant executed previous to the beginning of the cur-

rent term for which the bond was given, it does not follow,

it is a matter of fact and the defendant must show the burden of

establishing it. Stark v. The People, 88 Ill. 478, 480.

With a witness, however, would not follow the same

if the testimony is given, at the end of the term previous-

and was not in connection with which the bond in suit was given,

and in the effect that he then held bond such funds as he

was bound to discharge with, and he made a report to the

auditor and an accounting accordingly, such report and account-

ing being contrary to the fact. Barfield v. The People, 108 Ill.

418, 420; Stark v. The People, 88 Ill. 478, 480; Morris v.

The People, 78 Ill. 304; Barfield v. The People, 108

Ill. 418, 420. The same rule applies to the case

Barfield v. The People, 108 Ill. 418, 420, and distinction is

made that once saying, that in the money case, "the defendant

and auditor made his report at the end of his first term, and

and a definite sum remaining in his hands as his own account.

The report was approved by the auditing board, whose duty it was

to examine the same, and the auditor on the second term had

notice of what the record disclosed in that respect. It was

a reasonable conclusion that they assumed by their suretyship the obligation that rested upon their principal, as appeared by his own report on file at the time they entered into such obligation." Swisher v. Fidelity & Deposit Co. of Maryland, 164 Ill. App. 243, is to the same effect.

However, in the court below the case went off on another point. The trial judge took the view that the corporate society which was the obligee named in the bond, was not the proper party plaintiff, but that the one who had succeeded Petkus, as treasurer, was the proper party to bring suit, and on that theory the court sustained objections to all offers of proof made by the plaintiff in support of its case. Such action on the part of the trial court was error. The People v. Hart, 280 Ill. 345, 351-352.

After the trial court had made this ruling, counsel for the plaintiff went ahead and made such offer of proof as he conceived was proper and sufficient to make out a prima facie case and in this connection the court made rulings on a number of objections and although not necessary to a decision on this appeal, it is urged that we pass upon these matters as a guide to the trial court upon a retrial. This we believe would not be proper and further is hardly possible, because there is nothing in the record to indicate that the various offers made by the counsel for the plaintiff, made up his entire case and as to many of these matters, the record is insufficient to properly preserve the point.

We might add, however, that plaintiff's motions to amend, by adding an additional party defendant and also by correcting the name of the plaintiff society as it appeared

...the plaintiff's motion for summary judgment was denied. The court found that the plaintiff had established its right to recover damages for the loss of its business. The court also found that the defendant was liable for the plaintiff's damages. The court awarded the plaintiff damages of \$100,000. The court also awarded the plaintiff costs of \$10,000. The court's decision was affirmed by the appellate court.

However, in the court below the case went to the jury. The jury found in favor of the plaintiff. The jury awarded the plaintiff damages of \$100,000. The jury also awarded the plaintiff costs of \$10,000. The court's decision was affirmed by the appellate court.

After the trial court had made this ruling, the plaintiff moved for summary judgment. The court denied the plaintiff's motion. The court found that the plaintiff had established its right to recover damages for the loss of its business. The court also found that the defendant was liable for the plaintiff's damages. The court awarded the plaintiff damages of \$100,000. The court also awarded the plaintiff costs of \$10,000. The court's decision was affirmed by the appellate court.

We might add, however, that plaintiff's motion for summary judgment was denied. The court found that the plaintiff had established its right to recover damages for the loss of its business. The court also found that the defendant was liable for the plaintiff's damages. The court awarded the plaintiff damages of \$100,000. The court also awarded the plaintiff costs of \$10,000. The court's decision was affirmed by the appellate court.

in the amended statement of claim and should have been allowed. In asking leave to make the last amendment the plaintiff was not seeking to substitute one corporation for another as party plaintiff, but merely amend, by correcting the name of the plaintiff as alleged. The party plaintiff remained the same after the amendment as it was previous to the amendment.

Malleable Iron Range Co. v. Pusey, 244 Ill. 184; Congress Construction Co. v. Farson Co., 199 Ill. 398; Pennsylvania Co. v. Sloan, 125 Ill. 72, 77; Procter v. Wells Bros. Co., 262 Ill. 77; Ferenc v. Walden W. Shaw Auto Livery Co., Ill. App. First District #23546 opinion filed April 24, 1913.

For the reasons stated, the judgment of the Municipal Court will be reversed and the case remanded to that court for further proceedings not inconsistent with the views expressed herein.

REVERSED AND REMANDED.

In the foregoing statement of facts and events, it is shown that the defendant has been guilty of a crime, and that he is deserving of punishment. The facts are as follows: On the 1st day of January, 1900, the defendant, who is a resident of the County of New York, State of New York, was found guilty of the crime of larceny, to-wit: the stealing of a sum of money, to-wit: the sum of \$100.00, from the person of one John Doe, who is a resident of the County of New York, State of New York. The defendant was found guilty of this crime, and was sentenced to the State Prison for a term of years.

THE PEOPLE OF THE STATE OF NEW YORK, by and with the advice and consent of the SENATE and ASSEMBLY, do hereby enact and pass:
That the sum of \$100.00, which was stolen from the person of one John Doe, on the 1st day of January, 1900, be paid to the said John Doe, or to his heirs, assigns, or assigns, in full satisfaction of the claim of the said John Doe against the State of New York.

And the defendant, who is a resident of the County of New York, State of New York, is hereby sentenced to the State Prison for a term of years.

Enacted.

1900
JANUARY 1, 1900
NEW YORK
THE PEOPLE OF THE STATE OF NEW YORK, by and with the advice and consent of the SENATE and ASSEMBLY, do hereby enact and pass:
That the sum of \$100.00, which was stolen from the person of one John Doe, on the 1st day of January, 1900, be paid to the said John Doe, or to his heirs, assigns, or assigns, in full satisfaction of the claim of the said John Doe against the State of New York.
And the defendant, who is a resident of the County of New York, State of New York, is hereby sentenced to the State Prison for a term of years.

146 - 24065

MICHIGAN AVENUE TRUST COMPANY,
a corporation,

Defendant in Error,

vs.

MYER J. STEIN,

Plaintiff in Error.)

213 I.A. 655

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

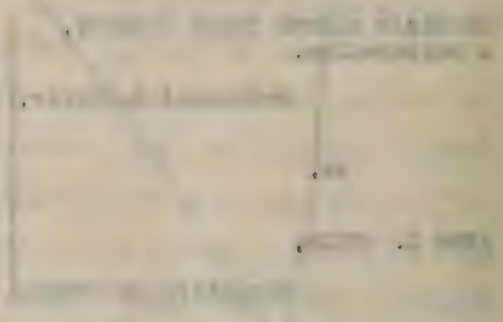
The plaintiff brought suit on several promissory notes of which the defendant was the maker and in which the plaintiff appeared as payee, as alleged in the verified statement of claim.

The defendant filed an affidavit of merits by his agent, stating that he verily believed that he had a good defense to the suit, upon the merits, to the whole of the plaintiff's demands. The affidavit then proceeded as follows: "Affiant further states that the defense of the defendant to said suit is as follows:

For a first and separate defense;- That the certain papers set out in the statement of claim are not the specific papers upon which a recovery can be had herein, and which papers were executed by defendant.

For a second and separate defense;- That the plaintiff is not the proper party in interest and is not the legal owner of said notes, and therefore is not indebted to this plaintiff in said sum or in any sum, whatsoever."

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2181A-82

The following is a summary of the information received from the source.

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A trial was had before the court, without a jury, resulting in a finding for the plaintiff, followed by a judgment in the sum of \$320.13, from which the defendant has appealed.

The first point urged by the defendant is that the trial court erred in denying his motion to strike the case from the trial call.

It appears from the record that the defendant procured a change of venue when the case first appeared upon one of the Municipal Court calls. Upon the change of venue being granted, the case went to the Chief Justice for re-assignment and upon motion of plaintiff, by counsel other than the counsel of record, in the case, it was re-assigned and again appeared upon one of the court calls. The record further indicates that the defendant, thereupon, moved to strike the case from the latter call on the ground that it was placed there on motion of counsel purporting to represent the plaintiff, who was not counsel of record, without the filing of any substitution of attorneys. This motion was denied, after which the substitution of the attorneys was filed. When the case was shortly thereafter reached for trial, defendant renewed his motion and it was again denied, and it was this action of the trial court which defendant now assigns as error. Although the substitution of attorneys should have been filed, before any steps were taken by counsel taking the place of the original counsel in the case, the action of the trial court in overruling this motion cannot be considered as error.

It is further urged by the defendant that his affidavit of merits having specifically put in issue the execution of the notes and the question of plaintiff's ownership of them, the burden of proving those matters specifically, was put upon the plaintiff and the proof fails to establish these points by a preponderance of the evidence.

At the time the case was tried, defendant was in court by his counsel. After the motion made by the defendant, above referred to, was overruled, the plaintiff introduced the notes in evidence and testified as to the amount of interest due, and rested. The defendant introduced no evidence, his counsel stating that they were going to stand upon the point raised by their motion to strike the case from the call. That being the state of the record the defendant is not in position to urge in this court for the first time that the evidence was insufficient to warrant the finding of the court.

It may be added that the affidavit of merits is wholly inadequate to interpose any special defense. The paragraphs of the affidavit, quoted above, are a mere lot of words and do not amount to either a denial of execution, or of the plaintiff's ownership. On the record the plaintiff made out a prima facie case and the defendant having stood silent, and introduced no testimony at all, resting his case upon the point made in the motion above referred to, the entering of the judgment against him was proper and it will therefore be affirmed.

AFFIRMED.

It is further stated by the defendant that his

attorney is William H. ...

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178 - 24099

STEVE KULISZOWSKY.

Appellee.

vs.

CHICAGO & NORTHWESTERN
RAILWAY COMPANY.

Appellant.

213 I. A. 653

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the defendant Railway Company from a judgment entered against it and in favor of the plaintiff, for the sum of \$15,000 in a suit for damages for personal injuries suffered by the plaintiff as a result of being struck by one of defendant's trains. The plaintiff was an employee of the defendant and when injured was working on a steel viaduct known as the Bradley Street Bridge, on one of defendant's main lines, in the City of Chicago.

This bridge or viaduct carried a number of tracks, which ran north and south. The first track on the west side of the viaduct was a switch track. The next was known as track No. 1 and was used by north bound Wisconsin Division trains. The next track, No. 2, was used by south bound Wisconsin Division trains. The next track No. 3, was used by north bound Milwaukee Division trains and the next track No. 4, was used by south bound Milwaukee Division trains. Beyond these tracks to the east were one or two other switch tracks. The defendant railway is what is known as a left hand road, that is, its trains run on the left hand track.

229 ATC 13

1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

1947-1948

The plaintiff was working in a gang of about a dozen men, chipping rust from the steel bed of the viaduct and in doing this work the men knelt or sat on the ties or rails so as to get at the parts to be chipped and cleaned. They were working on track No. 1, or the north bound Wisconsin Division track.

On the day in question, two trains left the Chicago terminal at 1:30 P.M., which was their schedule time for leaving. One was a Milwaukee Division train and went north over the Bradley Street Bridge on track No. 5, at about twenty-five miles an hour, about a train length ahead of the other, which was a Wisconsin Division train on track No. 1. The latter approached the bridge at about twenty miles an hour. That the men working on the bridge on track No. 1 did not become aware of the approach of the latter train as soon as they should have, is apparent from the fact that all the testimony is to the effect that they all had to move rapidly to get out of the way, some jumping over the girders paralleling track No. 1, and some running out at the ends of the bridge to escape being struck. They all got out of the way but one, the plaintiff, who was the farthest man north in the group. When he became aware of the train's approach, he jumped to the west, but did not clear the train, which struck his right arm as it passed, breaking it and causing the injuries here complained of.

The defendant's sole contention on this appeal is that the damages awarded are excessive. In support of this contention, three propositions are urged.

The first is that the evidence shows that the plain-

25

The plaintiff was injured in a fall from a ladder on June 1, 1901, while working on the roof of the building. The fall was caused by the negligence of the defendant, who failed to provide a safe working environment. The plaintiff sustained serious injuries, including a broken leg and a concussion, and has been unable to work since the accident.

The defendant claims that the plaintiff was negligent and that the fall was caused by the plaintiff's own carelessness. However, the evidence shows that the defendant was responsible for the accident. The plaintiff was following the instructions of the defendant's foreman, and the defendant failed to provide proper training and supervision. The defendant also failed to maintain the ladder in a safe condition, and the plaintiff was not given any warning of the danger. The plaintiff's injuries were a direct result of the defendant's negligence, and the defendant is liable for the damages.

The defendant's sole contention on this point is that the plaintiff was negligent. However, the evidence shows that the defendant was negligent and that the plaintiff was not. The defendant failed to provide a safe working environment, and the plaintiff was injured as a result. The defendant is liable for the damages, and the plaintiff is entitled to compensation for his injuries and lost wages.

tiff was guilty of contributory negligence, and the jury erred in not diminishing the damages by reason thereof. The action was brought under the Federal Employers' Liability Act. While the defense of contributory negligence has been eliminated in all cases coming within that Act, it provides that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to, the employee", except under certain circumstances which are not involved here.

We have examined the testimony in this record with great care, with a view to determining the alleged contributory negligence of the plaintiff and we have concluded that it would not justify a disturbance of the verdict on this ground.

Trains of the defendant company were passing over the Bradley Street Bridge every few minutes. There was more or less switching in the vicinity. It would be wholly impossible for the men working on the Bridge to be adequately warned of the approach of trains on the track upon which they were working by requiring them to depend upon the bells or whistles of the locomotives on such trains and therefore the defendant made other provision for such warning. There was attached to the gang of workmen, one who was termed a watchman, who was supplied with a shrill whistle. It was his sole duty to watch for approaching trains and by means of this whistle, warn the men in time to enable them to get off the track and clear of the train in order to avoid the danger incident to its passing. There was another gang of men working on one of the other tracks at this time. The plaintiff testified that he was employed by one Wolf, the

foreman of his gang, and at the time he went to work Wolf told him that they had a watchman who would warn the men by blowing his whistle when a train was approaching. His instructions were further to the effect that if upon looking up, when the whistle was blown, the watchman was seen to be standing in the track upon which the men were working, they were to know that a train was approaching on their track and the whistle was a warning to them and they were to immediately get off the track but if he was seen to be standing in some other track, they need pay no further attention to the warning but would know that it had been intended as a signal of the approach of a train on some other track and a warning to such men as might be working on that track. The foreman, Wolf, was a witness and although he denied another alleged custom of the defendant, on which there had been some testimony, he did not deny the foregoing testimony of the plaintiff which was corroborated by at least one other workman of the gang, who testified.

The testimony is conflicting as to whether the watchman blew his whistle as a warning of the approach of the train which struck the plaintiff, at all. He says he did blow it. He is corroborated by the fireman of the Milwaukee Division train who testified that as his train passed over the Bradley Street Bridge he saw the watchman standing on track No. 2 and that he noticed that he was not paying any attention to the train that was approaching on track No. 1, so he, the fireman, whistled at the watchman as his train passed and pointed back at the other train, whereupon the watchman, still standing on track No. 2, blew his whistle.

The plaintiff testified he heard no whistle blown by the watchman but his first warning came when he heard the locomotive whistle whereupon he tried to get out of the way but was unable to clear the train entirely. In this he is corroborated by several of his fellow workmen who were witnesses. None of the workmen in the gang testified to having heard the watchman blow his whistle. Even the foreman, Wolf, who was one of defendant's witnesses, testified that he did not hear the watchman blow a whistle. At the time, he was kneeling down at work next to the plaintiff and he says, "the first I heard of the approach of the train was a shriek whistle from the engine." He says at this time the train was 100 or 200 feet away and he got up and jumped over the girder. Why plaintiff did not do likewise does not appear. Whether he became aware of the approach of the train at the same time is not clear. One thing is certain - if the watchman did blow his whistle, he was not indicating to the men, by his position, that a train was approaching on the track on which they were working for he was over on track No. 2. This was important for a curve in the track made it difficult for men at work down on the track to determine this question for themselves. The watchman testifies he knew that these two trains left the terminal at the same time and that he was looking out for them. He says further that he had just blown his whistle as a warning to a gang of carpenters at work on track No. 3, upon the approach of the Milwaukee Division train. But if the fireman of that train is to be believed, the watchman was caught off his guard by the approach of the other train and did not give such a warning of its approach

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as the men had been told would be given. But if the jury concluded from all the testimony that the watchman's whistle was not blown at all and that therefore there had been no adequate warning, we could not say that their finding was against the manifest weight of the evidence and on either theory therefore, they would not be called upon to diminish the damages awarded by reason of any contributory negligence on plaintiff's part.

The second proposition urged by defendant is that plaintiff's injuries were increased and enhanced by reason of his own negligent conduct following the breaking of his arm, and that the verdict includes damages for such increased injuries, and it should therefore not be allowed to stand. There are two matters to which our attention has been directed by defendant, in support of this proposition - first, there was no injury to the musculo-spiral nerve while the plaintiff was under the care of the defendant's surgeon at St. Lukes Hospital and his arm was not paralyzed when he left the hospital on December 17, promising to return for further treatment, which he never did; and second, beginning in October and from then on to the time he left the hospital in December, he persisted in refusing to permit an open operation and that this contributed to his present condition.

It appears from the evidence that at the time of the trial of this case, the plaintiff was suffering from a 95% paralysis of his right arm. He had what was described as a typical case of wrist drop, which is a complete drooping of the hand due to paralysis or severance of the musculo-spiral nerve. He could not extend his hand or straighten out his

On November 17, following treatment for further treatment, which was given him; and secondly beginning in October and from then on he has been in the hospital in November, he remained in the hospital to prevent it from being too late.

thumb or fingers. This, it was testified was a permanent condition which could never improve.

Upon being injured on September 1, the plaintiff was taken to St. Lukes Hospital and there was under the care of Dr. Hopkins, chief surgeon for the defendant company until December 17, when, Dr. Hopkins testified, he let the plaintiff return to his home for the holidays with the understanding and promise on his part, that he would return immediately thereafter and submit to an open operation. He never returned to St. Luke's Hospital, but on December 20, he consulted Dr. Adams who later took him to the West Suburban Hospital, where on December 23, he was operated on by Dr. Oliver.

Dr. Adams testified that when he removed the bandages from plaintiff's arm, on December 21 or 22, he found he was suffering from paralysis of the fore arm. Upon operating on December 23, the musculo-spiral nerve was found to be completely severed.

It is contended by defendant that this feature of plaintiff's injury must have been caused by something that happened after he left St. Luke's hospital on the 17th, and before he consulted Dr. Adams. It is shown by the testimony that severance of the musculo-spiral nerve produces wrist drop immediately. Dr. Hopkins testified that the plaintiff did not show any evidence of wrist drop at any time while he was under his care and that all during this time he could extend and raise his hand and fingers which is impossible where there is a paralysis or severance of the musculo-spiral nerve. Dr. Hopkins was corroborated in this by a

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SECRET

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

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hospital nurse and four internes, who cared for and had occasion to observe the plaintiff from time to time.

On the other hand Dr. Adams and Dr. Oliver testified that when the arm was opened up, the musculo-spiral nerve was found to be involved in a mass of scar tissue and when that had been removed, it was found that the nerve had been torn across and completely severed, its ends being about a quarter of an inch apart. The testimony showed that this nerve is about the size of a lead pencil. The end of the nerve nearest the body was enlarged and bulbous and the part below the injury was atrophied. From this condition and the presence of the scar tissue, the two doctors last referred to, gave it as their opinion that the injury to the nerve was not a recent one, Dr. Adams testifying that it had probably been a matter of a few weeks and Dr. Oliver testifying that the indications were that the break in the nerve had occurred "some time before, - anyway a month before."

The testimony was further to the effect that the injury to plaintiff involved a fracture of the bone of the right arm just above the elbow and the bone broke in such a way as to leave rough, broken edges. During the time that plaintiff was under the care of Dr. Hopkins, at St. Luke's Hospital, he made repeated attempts to bring the two ends of the broken bone into apposition by the process of extension but was not successful or only partially so and that a proper union could not be brought about, due apparently to the presence of tissue of some sort getting in between the broken ends of the bone. Dr. Adams testified that it is possible for

thumb or fingers. This, it was testified was a permanent condition which could never improve.

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January 2, 1944

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THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS
JANUARY 19, 1964

It is suggested by correspondence that this document is
dated 1942, and that it has been used in some way since
that time. It is suggested that it is a copy of a letter
dated 1942, and that it is a copy of a letter dated 1942.

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which is well known to all who are familiar with the country. It is a fact which is well known to all who are familiar with the country. It is a fact which is well known to all who are familiar with the country.

a nerve to be caught between fragments of a fractured bone and cause pressure which would cause paralysis.

On the question of the operation, Dr. Hopkins testified that in October he told the plaintiff that he was afraid there was tissue between the ends of the bone and that he would have to perform an open operation but plaintiff said he did not want an open operation - that he brought the question up with plaintiff at intervals in October and again in November and that the last time ^{was} on December 17, when plaintiff left the hospital. He was corroborated in this by three of the internes. On the other hand plaintiff testified that Dr. Hopkins never took up the question of an operation with him in October nor in November and that nothing of the kind was suggested until the last few days he was at St. Luke's Hospital when Dr. Hopkins said if he did not get better he would have to operate on the arm. When he left St. Luke's Hospital, plaintiff testified, Dr. Hopkins said to him, "You can go home; I see you next week. If your arm don't get better I got to do operating." On cross examination Dr. Hopkins testified that he held the arm in splints awaiting developments until the middle of October when he took another X-Ray, ~~which~~ which showed he had not secured proper apposition. Then he had the talk he had testified about, as to an operation. Then he tried to get better apposition by another extension, again putting the arm in splints and leaving it a couple of weeks longer. Then he took another X-ray which showed no improvement. He then tried further extension. Then he says he let the splints remain until the latter part of November. During this time the swelling was gradually going down, and when

plaintiff left the hospital in December his arm was in fairly good condition for an operation - that so far as the swelling was concerned, it was not of such a character in October that he could not have operated.

Dr. Hopkins further testified on cross-examination that when he talked with the plaintiff about an operation he did not mention the musculo-spiral nerve or suggest that the operation was needed on that nerve; that so far as the operation on the bone was concerned it could have been done a month later just as well as it could at that time,- just as well in January as in October; that he did not see any serious obstacle in the way of letting the operation rest and trying further extension and he therefore gave the plaintiff every chance before proposing an operation.

In this state of the record we cannot say that the verdict of the jury was against the manifest weight of the evidence in that it showed that the injury to the nerve occurred after the plaintiff left St. Luke's Hospital or that he failed to act as an ordinarily prudent man of his apparent degree of intelligence should act, so far as the suggested operation was concerned. The evidence was in considerable conflict on these matters and they were for the jury to determine and it cannot be said that this verdict is not supported by the evidence.

Finally it is urged by the defendant that the verdict rendered by the jury is grossly excessive for a common laborer such as the evidence showed the plaintiff to be. Plaintiff in recent years, was shown to have worked as a night janitor, and a laborer earning between \$50 and \$60 per month. While

testimony that the defendant was not in the
room at the time of the operation - that fact was the basis
of the evidence. It was not of such a character in October
that he was not there.

It is also stated that the defendant was not in the
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character in October that he was not there.

In this case of the record we cannot say that
the verdict of the jury was against the weight of
the evidence in that it showed the injury to the nerve
was caused by the defendant's act. The defendant's act
was not found to be an ordinary - punishment - act of his
own free will or intelligence should not be taken as the
basis of the evidence. The evidence was in
the defendant's favor on these matters and they were for the
jury to determine. It cannot be said that this verdict is
not supported by the evidence.

Usually it is held by the defendant that the verdict
was against the weight of the evidence for a common laborer
such as the evidence showed the defendant to be. Plaintiff
is not a laborer, he is a professional man. While
and a laborer working between \$25 and \$30 per month.

there may be said to have been some conflict in the evidence, we believe that the jury were warranted in believing that the plaintiff's right arm had been rendered practically useless by his injury and that this condition was a permanent one. It is quite apparent that plaintiff has not been totally disabled by his injury and will in all probability be able to engage in some useful employment that will enable him to earn some part of the amount he formerly received. The testimony was to the effect that apart from the injury to his arm, the plaintiff was in good physical condition.

Plaintiff has suffered much as a result of his injury. The repeated attempts to bring the broken ends of the bone into apposition by means of extension, caused him excruciating pain. He probably would have suffered less both as to past and future pain and as to loss of his bodily powers and efficiency if he had lost his arm entirely. Defendant points out that one of the doctors testified that there were cases of this kind where sutured nerves have been known to result in partial or even practically full recovery after some years, and in this case scarcely more than a year elapsed between the time of receiving the injury and the trial of the case. The serious consideration of such opinion evidence, however, involves conjectures we cannot indulge. In view of the facts we have referred to can it be said that a verdict of \$15,000 should be considered excessive? It has been held that the question of the proper measure of damages in a case of this kind, is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act must be settled according to the general principles of law administered ^{the} in federal courts. C. & O. R. R. v. Kelly, Adm., 241

DATE: 10/10/1968

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U.S. 485, 491. The court there held that the damages recovered should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.

In the case of Vicksburg and Meridian Railroad Company v. Putnam, 118 U. S. 545, the court held the plaintiff was "entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant." The plaintiff in that case was a man 49 years of age. He was injured while riding in one of the defendant's trains as a passenger. His injuries consisted of broken collar-bone, shoulder blade and ribs and his sight, hearing, ease of breathing and capacity to do business were impaired. He recovered a verdict of \$16,000. It was set aside and the judgment reversed because of error in the admission of evidence relating to and the giving of certain instructions on the question of the measure of damages.

In the case of Young v. Lusk, 137 S.W. 849; 268 Mo. 628, the plaintiff was 47 years of age. He was a railroad man of many years experience and at the time of the injury involved in that case, he was employed as an air inspector in the yards of a railroad and was earning \$2.40 per day.

When he was injured by being run over by a car, his left arm was practically covered between the shoulder and the elbow. A verdict of \$12,000 was held excessive and the judgment ordered reversed unless the plaintiff remitted \$4,000. This case was brought under the Federal Employers' Liability Act and the decision was rendered in 1916.

In the case of Struble v. B.C.R.M. Ry. Co., 103 N. W. 142; 128 Iowa 198, the plaintiff was 27 years old. He was employed as a freight brakeman, earning \$60 to \$75 a month. His injury consisted of the loss of his left arm and involved the pain and suffering incident to an accident of that character. He recovered a verdict of \$12,000. The court held there must be a reversal of the judgment on the sole ground that the amount of damages was excessive. It was provided, however, that if a remittitur was filed of all that portion of the judgment above the sum of \$7,500, judgment for that amount would stand affirmed.

In G.R.I. & P. Ry. Co. v. Batsel, 140 N.W. 726; 100 Ark. 526, the plaintiff was injured at a railroad crossing when struck by a passing engine. The plaintiff was a man 41 years of age, earning about \$1,200 a year. He was struck in the back causing a rupture. He was painfully injured about the head, and his left arm was crushed to such an extent that its amputation was necessary. He was confined to his bed six weeks and suffered great pain during that time and up to the time of the trial of his case. His earning capacity was reduced to about \$300 a year. It was held that the verdict of \$17,000 was excessive and that if the plaintiff entered a remittitur

of all over \$7,000, judgment for that amount would be affirmed.

In Bradbury v. C.R.I. & P. Ry. Co., 120 N.W. 1; 149 Iowa 51, the plaintiff, a man of 24 years, was a brakeman, earning \$80 to \$85 per month. He was run over by some freight care, the wheels passing over his right arm injuring it so that amputation, near the elbow, was necessary. The court said that the loss of an arm would not prevent plaintiff from pursuing another occupation, though always at an inconvenience and probably with less remuneration. The jury fixed the damages at \$15,000, but the reviewing court held that \$12,000 would compensate the plaintiff for the injuries received and affirmed the judgment for that amount on the condition that plaintiff file a remittitur.

In Wimber v. Iowa Cent. Ry. Co., 87 N.W. 505; 114 Iowa 551, the plaintiff was a railway switchman, 39 years of age. The injury necessitated the amputation of his right leg, six inches below the knee and caused the pain, suffering, mental anguish, loss of time and a decreased ability to earn, usual in such cases. It was held that a verdict of \$14,500 should be reduced to \$8,000.

In Kroener v. C.M. & St. P. Ry. Co. 55 N.W. 23; 83 Iowa 16, it was held that damages in the sum of \$12,000 was excessive, where the plaintiff was twenty years old, earning \$60 a month and was not injured beyond the loss of a foot.

In I. C. R. R. v. Welch, 53 Ill. 133, the court said, "in one sense, it is true, a pecuniary value cannot be placed upon an arm. But inasmuch as the law can give only a pecuniary compensation * * * when the injury is one that

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CONFIDENTIAL - SECURITY INFORMATION

will still leave a plaintiff able to earn as much, in many occupations, as he was earning before the accident, we must hold a verdict to be unreasonable which gives him * * * a sum * * * the interest of which would amount to more than twice his wages."

In G. & N. W. Ry. Co. v. Kane, 70 Ill. App. 676, plaintiff was a laborer employed by the defendant, earning \$1 a day. He was about twenty years of age. His right arm was so crushed that it had to be amputated near the shoulder. It was held that in view of plaintiff's injuries, his earning capacity, education, and station in life, it was fully apparent that the verdict of \$20,000 was grossly excessive and the judgment for that amount was reversed and the cause remanded.

In P. D. & E. Ry. Co. v. Hardwick, 53 Ill. App. 161, the plaintiff was a switchman and he recovered a judgment of \$15,000 for the loss of a hand. The court said this was a sum sufficient to produce annually by way of interest, more than the plaintiff was earning, leaving the principal intact. The court was of the opinion that the damages were excessive, taking into consideration the fact that the plaintiff was entitled to compensation for his suffering saying that it did not follow from the fact that plaintiff had lost his hand, that he would be unable to earn a living in whole or in part.

Plaintiff has called our attention to a number of cases in which verdicts giving heavy damages for physical injuries have been sustained. In these cases, however, the injuries involved were far in excess of those suffered by the plaintiff in the case at bar, with the exception of the

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case of De Filippi v. Spring Valley Coal Co. 202 Ill. App. 61. In that case the plaintiff was a miner, about 19 years of age. His left leg was so crushed as to require amputation about six inches from the crotch. He earned \$2 to \$2.25 per day when the mine was operated, which was 150 to 200 days in the year. He had a high school education. This case differs somewhat from the case at bar. There the plaintiff was nearly ten years younger than the plaintiff here and was more intelligent and better educated. His possibilities were much greater than were those of the plaintiff here.

But after all it is difficult if not impossible to use other cases as a criterion of what is a proper measure of damages in a given case. Each case must rest upon its own peculiar circumstances. What has been held in other similar cases on this point is at most but an indication of the general standard by which courts have measured the amount of damages, which may be considered as proper compensation for the loss of limbs and the physical suffering incident to such injuries.

In view of all the circumstances involved in the case at bar, we are of the opinion that the verdict rendered by the jury was excessive and was the result of some passion or prejudice entertained by them, and that \$12,000 would represent a reasonable sum for plaintiff's pain and suffering and also a fair recompense for the loss of what he would otherwise have earned in his occupation and has been deprived of the capacity of earning by the wrongful act of the defendant. The judgment of the Circuit Court will therefore be affirmed for

[illegible]

\$12,000, provided plaintiff files a remittitur of all the judgment above that amount within fifteen (15) days from the date of the filing of this opinion,- otherwise the judgment of the Circuit Court will be reversed and the cause remanded for a new trial.

AFFIRMED ON REMITTITUR, OTHERWISE REVERSED
AND REMANDED.

[illegible]

6541

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213 I.A. 655

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. ~~DORRANCE DIBELL~~, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

~~CHRISTOPHER C. DUFFY~~, Clerk.

E. M. DAVIS, Sheriff.

Leaving Bench Oct 9 1918

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

the court

For the Second District

DUANE J. CARNES, Judge
JOHN M. WIEHAU, Judge
TRY Clerk

that afterwards,

the opinion of

said Court.

The People, etc., ex Rel., The City
of Sterling,

Appellee,

-vs-

The County of Whiteside, et al,

Appellants.

213 I.A. 655

Appeal from Whiteside.

Libell, P.J.

The City of Sterling petitioned the Board of Supervisors of Whiteside County to appropriate money to pay one-half of the cost of a bridge over Rock River pursuant to the provisions of section 35 of the Road & Bridge Act. The county refused. The city then began this suit in the circuit court by filing a petition against the County of Whiteside and its Board of Supervisors, asking that a writ of mandamus be issued against defendants, requiring them to grant the prayer of said petition for aid, and also that they be required to do certain other things. The State's Attorney entered the appearance of the defendants and consented that the cause might proceed as if defendants had been duly summoned. Defendants demurred to the petition for a mandamus. That demurrer was overruled. They then answered/ Petitioner demurred to the answer. That demurrer was sustained. Defendants elected to abide by their answer. Judgment was thereupon entered that a writ of mandamus issue, commanding said Board of Supervisors to make an appropriation from the county treasury of said county of \$65,642.50 being the amount necessary to meet one-half of the expense of constructing said bridge, on condition that the city of Sterling furnish the other one-half of the required amount. This is an appeal by de-

2131.A.655

Appeal from Whiteside.

The People, etc., ex Rel., The City

Appellants.

-vs-

The County of Whiteside, et al.

Appellants.

Whiteside, Ill.

The City of Sterling petitioned the Board of Supervisors of Whiteside County to appropriate money to pay one-half of the cost of a bridge over Rock River pursuant to the provisions of section 35 of the Road & Bridge Act. The county refused. The city then began this suit in the circuit court by filing a petition against the County of Whiteside and its Board of Supervisors, asking that a writ of mandamus be issued against defendants, requiring them to grant the prayer of said petition for aid, and also that they be required to do certain other things. The State's Attorney entered the appearance of the defendants and consented that the cause might proceed as if defendants had been duly summoned. Defendants demurred to the petition for a mandamus. That demurrer was overruled. They then answered. Petitioner demurred to the answer. That demurrer was sustained. Defendants elected to abide by their answer. Judgment was thereupon entered that a writ of mandamus issue, commanding said Board of Supervisors to make an appropriation from the county treasury of said county of \$65,642.50 being the amount necessary to meet one-half of the expense of constructing said bridge, on condition that the city of Sterling furnish the other one-half of the required amount. This is an appeal by de-

fendants from said judgment.

The petition for mandamus showed a full compliance with the requirements of said section 35 of the Road & Bridge Act, and showed that said county had no bonded indebtedness and showed an apparent ability of the county to comply with said statute and with the request of the city. The answer did not deny any of the allegations of the petition for mandamus. It set up two defenses. It alleged that there was not when said petition was filed nor when said answer was filed, any money in the county treasury, from which such appropriation could be made. That supposed defense is answered by what is held in *People ex Rel. v. C. & N.W. Ry. Co.*, 249 Ill. 170, where it is said that it is not essential to the validity of an appropriation by a county board to build bridges that funds to meet the same should be at the time in the treasury, but that an appropriation can be legally made of revenue to accrue in the future. Said answer further averred that said county board is unable to procure the necessary funds for said demand. This was followed by a statement of the usual annual expenses of said county for several preceding years and the amounts which said county had power to raise in those years. Those figures show a probable ability to levy a portion of such appropriation each year in the future. The only obstacle to raising the total appropriation very promptly, set up in the answer, was that at the annual meeting in September, 1917, the board had appropriated \$75,050 to build and improve the Lincoln Highway in said county, and had levied \$20,000 of taxes for that purpose. The allegations of the petition for mandamus, admitted by the silence of the answer, show that on December 12, 1916, at the regular December 1916, meeting of said Board of Supervisors, the City Council pre-

...from said judgment.

The petition for mandamus shows a full compliance with the requirements of said section 30 of the Road & Bridge Act, and showed that said county had no indebtedness and showed an apparent

ability of the county to comply with said statute and with the request of the city. The answer did not deny any of the allegations of the petition for mandamus. It set up two defenses. It alleged that there was not when said petition was filed nor when said answer

was filed, any money in the county treasury, from which such appropriation could be made. It supposed defense is answered by

what is said in People ex Rel. v. C. & N.W.Ry. Co., 242 Ill. 170, where it is said that it is not essential to the validity of an appropriation

by a county board to build bridges that funds to meet the same should be at the time in the treasury, but that an appropriation can be

legally made of moneys to accrue in the future. Said answer further alleged that said county board is unable to procure the necessary funds to meet the demand. This was followed by a statement of

the annual expenses of said county for several preceding years and the amounts which said county had power to raise in those years.

These figures show a probable ability to levy a portion of such appropriation each year in the future. The only obstacle to raising

the total appropriation very promptly, set up in the answer, was that at the annual meeting in September, 1917, the board had ap-

propriated \$5,050 to build and improve the Lincoln Highway in said county, and had levied \$80,000 of taxes for that purpose. The

allegations of the petition for mandamus, admitted by the silence of the answer, show that on December 12, 1916, at the regular December

1916, meeting of said Board of Supervisors, the City Council pre-

sented to said board its petition for this appropriation for this bridge, and that the County Board failed and refused to make the appropriation; so that the situation is that the defendants, by an appropriation in September, 1917, seek to deprive themselves of the power to perform the duty which was cast upon them in December, 1916. This defense ought not to be looked upon with favor. We are of the opinion that under the showing made by the answer the county will be able by taxation or otherwise, to raise the amount of this appropriation, though not all in one year. It was held in Board of Supervisors v. People, 222 Ill. 9, that to justify awarding such a writ of mandamus, it must appear that the necessary funds are on hand or otherwise under the control of the defendant. We are of the opinion that the court below properly held that the expression relating to funds under the control of the defendant must mean funds available to defendant by the exercise of its statutory and constitutional powers. We are of opinion that it does not appear by the answer that defendant cannot respond to this writ by the exercise of those powers, and that the court therefore properly sustained the demurrer to the answer.

The judgment is therefore affirmed.

...to said said petition for this appropriation for this
...and that the County Board failed and refused to make the
...so that the situation is that the defendants, by
...in September, 1911, seek to deprive themselves of
...the duty which was cast upon them in December,
1910. This defense ought not to be looked upon with favor. We
are of the opinion that under the showing made by the answer the
county will be able by taxation or otherwise, to raise the amount
of this appropriation, though not all in one year. It was held
in *Board of Supervisors v. People*, 222 Ill. 9, that to justify a
writ of mandamus, it must appear that the necessary
funds are on hand or otherwise under the control of the defendant.
We are of the opinion that the court below properly held that the
appropriation relating to funds under the control of the defendant must
be made available to defendant by the exercise of its statutory
and constitutional powers. We are of opinion that it does not
appear by the answer that defendant cannot respond to this writ
by the exercise of those powers, and that the court therefore pro-
perly sustained the demurrer to the answer.

The judgment is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

THE STATE OF ILLINOIS

IN SENATE

REPORT OF THE COMMISSIONER OF THE LAND OFFICE
 IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
 JANUARY 18, 1892

ALBANY: J. B. LEECH, PRINTING OFFICE, 1892.

THE STATE OF ILLINOIS
 SENATE
 REPORT OF THE COMMISSIONER OF THE LAND OFFICE
 IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
 JANUARY 18, 1892

ALBANY: J. B. LEECH, PRINTING OFFICE, 1892.

6446

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213 I.A. 656

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

Leaving Denied Oct 9. 1918

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen . No. 6446.

Agenda No.46.

Charles E. Smith,

213 I.A. 656

Appellee,

-vs-

Appeal from LaSalle.

Frank C. Bellrose,

Appellant.

Carnes, J.

Charles E. Smith, appellee, sued Frank C. Bellrose, appellant, in assumpsit, and in the special count of his declaration alleged that the plaintiff orally leased to the defendant 10.50 acres of land from February 1, 1904, to July 30, 1908, on terms and conditions expressed in a written lease theretofore executed between the plaintiff and Harry W. Bellrose, a brother of the defendant, setting out said written lease in hoc verba, which contained the following description of land:- " The East Ten and 50/100 (10 50/100) acres of the East Half ($E\frac{1}{2}$) lying north of the canal of the North-half ($N\frac{1}{2}$) of the South-West quarter (S.W. $\frac{1}{4}$) of Section Eighteen (18) In Township Thirty-three (33) North Range Three (3) east of the Third (3) Principal Meridian in the County of La Salle and State of Illinois"; that the defendant entered into possession of said premises and mined and removed large quantities of sand therefrom and failed to pay royalty or rental as in the written lease provided of five cents per ton for sand so removed. This is the only count on leasing of land, but the common counts were added. On the trial appellant refiled the general issue, which as to the special count had on a former trial been withdrawn; therefore appellee was required to prove, among other things, the description of the land

required to prove, among other things, the description of the land

had on a former trial been withdrawn; therefore appellee was

appellee relied the general issue, which as to the special count
of land, but the common counts were added. On the trial

ver ton for sand so removed. This is the only count on leasing
royalty or rental as in the written lease provided of five cents
removed large quantities of sand therefrom and failed to pay

thereafter entered into possession of said premises and mined and

in the County of La Salle and State of Illinois"; that the de-

North Range Three (3) east of the Third (3) Principal Meridian

(2.7.4) of section eighteen (18) in Township thirty-three (33)

of the canal of the North-half (N $\frac{1}{2}$) of the South-West quarter

50\100 (10 50\100) acres of the East Half (E $\frac{1}{2}$) lying north

contained the following description of land:-- "The East Ten and

the defendant, setting out said written lease in hoc verba, which

executed between the plaintiff and Harry W. Belrose, a brother of

terms and conditions expressed in a written lease therefore

10.00 acres of land from February 1, 1904, to July 30, 1908, on

them alleged that the plaintiff orally leased to the defendant

well as, in assumption, and in the special count of his declara-

Charles E. Smith, appellee, and Frank C. Belrose, ap-

Cross, A.

Appellant.

Frank C. Belrose,

-v-

appellee,

Appeal from LaSalle.

Charles E. Smith,

2131A 656

Vol. 6446.

Page No. 46.

demised. The evidence read with that, offered and excluded, showed that appellant had taken large quantities of sand from the right of way of the Chicago, Rock Island & Pacific Railway Company for which he refused to account to appellee, and tended to show that said part of the railway right of way was included in the description of land found in said written lease to Harry W. Bellrose. The court directed a verdict for the plaintiff for \$1478.50, and after overruling the defendant's motions for a new trial and in arrest, entered judgment thereon.

The main contest is on the question whether appellant is obliged to pay appellee for sand taken from said railroad right of way. If appellant leased of appellee land which by its description included that portion of the right of way, he could not in an action for rent defend on the ground that his landlord did not own the land demised because he is not allowed to dispute his landlord's title.

Appellee in support of his claim that appellant orally contracted to rent the land described in said written lease and undertook to assume the obligations there imposed, called as a witness the official court reporter who was examined and cross examined as to statements made by appellant as a witness in an action tried before this suit was begun brought by appellee against Harry Bellrose. It appeared that he there testified that he was present at a conversation between appellee and Harry Bellrose in which Harry said, in substance, that he was not going to continue operations on that land; and appellee said, Who is going to stay there in business? and appellant said, If you can arrange to keep on, to get these cars in down there, I would like to try and open up that place, to which appellee replied,

The evidence read with that, offered and excluded, showed that appellant had taken large quantities of sand from the right of way of the Chicago, Rock Island & Pacific Railway Company for which he refused to account to appellee, and tended to show that said part of the railway right of way was included in the description of land found in said written lease to Harry W. Belrose. The court directed a verdict for the plaintiff for \$177.50, and after overruling the defendant's motions for a new trial and in arrest, entered judgment thereon.

The main contest is on the issue whether appellant is entitled to pay appellee for sand taken from said railroad right of way. Appellant leased of appellee land which by its description included that portion of the right of way, he could not in an action for rent defend on the ground that his landlord did not own the land demised because he is not allowed to dispute his landlord's title.

Appellee in support of his claim that appellant orally contracted to rent the land described in said written lease and undertook to assume the obligations there imposed, called as a witness the official court reporter who was examined and cross examined as to statements made by appellant as a witness in an action tried before this court was begun brought by appellee against Harry Belrose. It appeared that he there testified that he was present at a conversation between appellee and Harry Belrose in which Harry said, in substance, that he was not going to continue operations on that land; and appellee said, who is going to stay there in business? and appellant said, if you can arrange to keep on, to get these cars in down there, I would like to try and open up that place, to which appellee replied,

All right; and appellant said that he was willing to operate under the same conditions that were contained in the lease of Harry W. Bellrose; if we could get the cars in he would make a lease with him; he should draw up a contract like the one he had with Harry; that he would go in there and operate under the same conditions if he would draw up a contract; that he, the witness, had then never seen the contract between appellee and Harry Bellrose and did not know what kind of a contract it was except that the royalty or rent was five cents a ton; that appellee was to draw up a contract, and he asked him afterwards if he had done so, and he answered no, to go on and they would attend to it afterwards, and he never went back to have the lease drawn; that he supposed everything was all right and was satisfied to pay the five cents a ton.

On the present trial appellee testified that he did not remember having any such conversation with appellant and did not think he had any. And appellant, while not denying that he testified as above indicated on the former trial, now testified that the conversation there referred to was only that he would go down there and take out the sand and pay five cents a ton royalty on all the sand taken out on appellee's property if he, appellee, would draw up a contract; that no particular territory was mentioned except the locality was named as his, appellee's place at Buffalo Rock; that there was nothing said about the lease between appellee and Harry Bellrose, and appellant did not know where appellee's land began or ended when he went there. This is the substance of all the testimony as to what land was described or mentioned in the conversation relied on to prove an oral leasing from appellee to appellant.

all right; and appellant said that he was willing to operate under the same conditions that were contained in the lease of Harry Bellrose; if we could get the data in his work make a lease with him; he should draw up a contract like the one he had with Harry; that he would go in there and operate under the same conditions if he would draw up a contract; that he, the witness, had then never seen the contract between appellant and Harry Bellrose and did not know what kind of a contract it was except that the royalty or rent was five cents a ton; that appellee was to draw up a contract, and he asked him afterwards if he had done so, and he answered no, to go on and they would attend to it afterwards, and he never went back to him the least amount; that he supposed everything was all right; he was satisfied to pay the five cents a ton.

On the recent trial appellee testified that he did not remember having any such conversation with appellant and did not think he had one. And appellee, while not denying that he testified as above indicated on the former trial, now testified that the conversation there referred to was only that he would go down there and take out the sand and pay five cents a ton royalty on all the sand taken out on appellee's property; if he, appellee, would draw up a contract; that no particular locality was mentioned except the locality was named as his appellee's place at Buffalo Rock; that there was nothing said about the lease between appellee and Harry Bellrose, and appellant did not know where appellee's land began or ended when he went there. This is the substance of all the testimony as to what land was described or mentioned in the conversation which he to prove an oral lease from appellee to appellant.

Appellant's testimony tends to show that he had fully paid appellee for all sand removed from premises outside of the railroad right of way. While appellee does not admit this in his argument, still he does not claim that excluding sand taken from said right of way he is entitled to the verdict and judgment here rendered; therefore, if there was a fair question for the jury whether the oral leasing by its terms covered the railway lands, the court erred in directing a verdict for the plaintiff. If the conversation relied on as a basis of this action/^{is}correctly stated by appellant on this trial, no land was particularly described, and there is no reason to presume that either party to that conversation intended that the contract when drafted should include any land not owned by appellee. There is evidence tending to show that appellant then supposed that appellee owned land there to which he is now said to have no title, and that he did mine and pay for sand from the railroad right of way on the supposition that it was appellee's land; but if the conversation was an undertaking to mine sand only on land owned by appellee ~~in~~ with no other boundary named, we see no reason why appellant in this action would be bound to pay for sand mined on the land of some other party. We conclude a fair question for the jury was presented; that it was for them to determine whether the oral contract was to rent the land described in the lease to Harry W. Bellrose or was limited to land owned by appellee at that point; therefore the court erred in directing a verdict for the plaintiff.

We reviewed a former trial of this case on appeal by the plaintiff from a judgment on one dollar in his favor, and reversed and remanded the case (200 Ill.App. 368) We then held that

plaintiff's testimony tends to show that he had fully paid
the balance for all sand removed from premises outside of the rail-
road right of way. While appellee does not admit this in his
answer, still he does not claim that, excluding sand taken
from right of way he is entitled to the verdict and judgment
here rendered; and, if there was a fair question for the
jury whether the sand leased by the terms covered the railway,
the court erred in directing a verdict for the plaintiff.
If the conversation relied on as a basis of this action, correctly
stated by appellee on this trial, no land was particularly
described, and there is no reason to presume that either party
in that conversation intended that the contract when created
should include any land not owned by appellee. There is
evidence tending to show that appellee then supposed that
appellee owned land there to which he is now said to have no
title, and that he did mine and pay for sand from the rail-
road right of way on the supposition that it was appellee's land;
but if the conversation was an undertaking to mine sand only on
land owned by appellee inasmuch as with no other boundary named, we see no
reason why appellee in this action would be bound to pay for
sand mined on the land of some other party. We conclude a fair
question for the jury was presented; that it was for them to
determine whether the oral contract was to rent the land described
in the lease to Harry W. Bellrose or was limited to land owned
by appellee at that point, therefore the court erred in directing
a verdict for the plaintiff.

We reviewed a former trial of this case on appeal by the
plaintiff from a judgment on one dollar in his favor and reversed
and remanded the case (200 Ill. App. 268). We then held that

the terms of the oral leasing, as set out in the special count of the declaration were admitted by the pleadings. Before the last trial the general issue was refiled, thus presenting a question on the evidence that was not then before us. Appellee now says the refiling of the general issue presents no question not presented before; but we held the description of the premises demised was admitted because the plea was withdrawn. We now see no error in that holding; but if there was, it is the law of this case on this appeal and we must now say the refiling required proof of the description.

There is a question of set off or recoupment arising on appellant's claim that he was ordered off the premises by appellee after he had stripped some ground on land owned by appellee preparatory to taking out the sand, and that he ought to be paid for that work in stripping the land. We said in our former opinion if he was in fact evicted and on that account suffered damages there is no doubt about his legal right to recoup such damages against the rent due. But we pointed out the testimony in the record and held it did not show an eviction. We also said that the evidence as to a fair charge for stripping was not admissible under the averments of the plea of set off. The general issue as to the first count was not then on file and the right to recoup damages under that plea was not considered. On the last trial appellant offered to prove that the brother of appellee, acting for and on the authority of appellee, told him that he would have to get off the premises if he was not going to pay for all that sand whether it was from the right of way or any other place, and appellant quit removing sand outside the right of way. If he was not bound to pay for sand on the right of way this

the terms of the oral leasing, as set out in the special count of the declaration were admitted by the plaintiff. Before the last trial the general issue was relied, thus presenting a question on the evidence that was not then before me. Appellee now says the reliance of the general issue presents no question not presented before; but we held the description of the premises described in the pleadings; but we held the description of the premises described in the pleadings because the plea was withdrawn. We now see an error in that holding; but if there was, it is the law of this case on this appeal and we must now say the relying referred to is not of the description.

There is a question of set off or recoupment arising on appellant's claim that he was ordered off the premises by appellee after he had stripped some ground on land owned by appellee preparatory to taking out the sand, and that he ought to be paid for that work in stripping the land. We said in our former opinion if he was in fact evicted and on that account suffered damages there is no doubt about his legal right to recover such damages against the rent due. But we pointed out the testimony in the record and held it did not show an eviction. We also said that the evidence as to a fair charge for stripping was not admissible under the averments of the plea of set off. The general issue as to the first count was not then on file and the right to recoup damages under that plea was not considered. On the last trial appellant offered to prove that the brother of appellee, acting for and on the authority of appellee, told him that he would have to get off the premises if he was not going to pay for all that sand whether it was from the right of way or any other place, and appellant duly removing sand outside the right of way. If he was not bound to pay for sand on the right of way this

tends to show an eviction. Appellant during the trial asked to file a plea setting up this claim, which the court denied. Appellant should be permitted before another trial to file such pleas as he sees fit, setting up this claim. Their sufficiency can then be considered; also the question whether the claim is of a nature that evidence of such damages can be given under the general issue.

Appellant argues that the court erred in not permitting proof that the description of land recited in the written lease to Harry Bellrose did not include the railroad right of way. He had the right to show that fact, if it is a fact, by a competent surveyor or by other competent evidence that would locate the land covered by that written description, but we do not think the court erred in refusing evidence only showing or tending to show that appellee did not in fact own the land covered by that description. If the description in the written lease does not enable a competent surveyor to find the boundary lines of the land, then that fact can be proved by competent evidence.

Many questions are presented on the details of the trial, rulings on evidence, and instructions. It is claimed that incompetent evidence for appellee was admitted as to the amount of sand removed by appellant. We are inclined to the opinion that railroad records received in evidence were competent under the rule announced in *P.C.C. & St.L.Ry.Co., v. Chicago*, 242 Ill. 178; but there was other proof of the amount of sand removed, and if the ruling of the court went beyond the rule there announced there was no prejudicial error in that regard.

to show an error. Appellant says the trial judge to
the fact that the claim, which the court denied. Ap-
pellant would be permitted before another trial to this same
fact as it was fit, setting up this claim. Their sufficiency
can then be considered; also the question whether the claim is
of a nature that evidence of such damages can be given under the
general law.

Appellant argues that the court erred in not permitting proof
that the description of land recited in the written lease to
Harry Bellrose did not include the railroad right of way. He
had the right to show that fact, if it is a fact, by a competent
surveyor or by other competent evidence that would locate
the land covered by that written description, but we do not think
the court erred in refusing evidence only showing or tending to
show that appellee did not in fact own the land covered by that
description. If the description in the written lease does not
enable a competent surveyor to find the boundary lines of the land,
then that fact can be proved by competent evidence.

Many questions are raised on the details of the trial,
regarding the evidence and instructions. It is claimed that in-
competent evidence for appellee was admitted as to the amount of
and removed by appellant. We are inclined to the opinion that
evidence records received in evidence were competent under the
rule announced in P.G.C. & St.L.Ry.Co. v. Chicago, 242 Ill. 178;
but there was other proof of the amount of and removed, and if
the ruling of the court went beyond the rule there is no ground
there was no prejudicial error in that regard.

The case was tried on the theory that appellant could not be permitted to show that appellee did not own the land on the railroad right-of-way from which sand was taken, which was correct if it had been conclusively shown that the oral lease included that land. We hold, as before stated, that the evidence left a question for the jury whether appellant orally agreed to lease the land described in the written lease to Harry Bellrose, or only agreed to lease the land that appellant owned at that point; that his testimony on that question as a witness in his own behalf should have gone to the jury to be considered along with the proof of what he had stated on the other trial. After he introduced testimony fairly tending to show that the land orally leased was limited to the land owned by appellee, he had the right under the general issue to show what land there was in fact owned by appellee. It is not a question of contradicting a writing, or of denying the execution of terms of such an instrument. There is no claim that appellant was in possession under a written lease. If he orally agreed to lease land described in a writing he is bound by that agreement whether that writing was a lease or a tax receipt, or a deed. It is of no significance that the writing was a lease instead of some other document. On the question of recoupment it will be seen by reference to our former opinion that the evidence as to eviction is now substantially different from that on the former ~~trial~~ trial recited in that opinion, and the pleadings under which that evidence might be admissible are different from what they ~~they~~ were because the general issue was refiled before the present trial. We do not think it necessary to discuss other questioned rulings of the court. They were for the most part naturally based on the theory on which

... was before the jury that ...
... to show that ...
... the case was tried, and the questions will not arise in a trial.
... the same have appeared. For the errors indicated the
judgment is reversed and the case remanded. (This was a ...
... reversed and remanded.
... to have the land that ...
... the question as to whether ...
... have gone to that ...
... of what he had stated on the other ...
... of testimony ...
... in the land ...
... a question ...
... of changing the execution of ...
... There is no claim that ...
... It is ...
... by the ...
... or a ...
... that the ...
... On the question of ...
... to the former opinion that ...
... still ...
... in the ...
... while ...
... was ...
... it is necessary to ...
... for the ...

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

and very true
and very true

THE DISTRICT COURT OF THE SECOND DISTRICT OF THE STATE OF ILLINOIS, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the case of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of the said Appellate Court at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Chief of the Appellate Court

6538

252a

213 I.A. 656

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. ~~JOHN~~ JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

*Opinion modified and refiled
Re-Hearing denied Oct 9/18*

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

0.135

75

at the Second District
out for one thousand
a copy, the more ... of April

CHRISTOPHER O. DUFFY, Clerk
M. STEINHAUS, Justice
W. DUANE J. GARNER, Justice
DORRANCE DIBBLE, Press

in the ...
"darker"

that afternoon, so with it
the opinion of the Court was filed
office of said Court in the words and figures
185 1918

Gen. No. 6438

Hugo Albert Weskalnies, appellant.

213 I.A. 656

vs

Appeal from DuPage.

John F. Hesterman, Sheriff, appellee.

Niehaus, J.

This is an action of replevin commenced by the appellant Hugo A. Weskalnies in the Circuit Court of DuPage County against John F. Hesterman, Sheriff of said county, to recover the possession of certain goods and chattels which had been levied upon by the appellee as sheriff, by virtue of an execution issued upon a judgment against Albert Weskalnies, the father of appellant; the judgment was entered by confession in the circuit court of said county on the 14th. day of December 1916 and the execution was levied upon the goods and chattels involved in this controversy on the 21st. day of December 1916. The evidence shows, that the judgment debtor, Albert Weskalnies, during the year 1916 was engaged in the business of ~~dairy~~ farming upon ~~an 80-acre~~² farm, which he held under a lease and which was ~~situated~~ near Naperville, Illinois, in the county mentioned; and that the appellant worked for him; that on the 18th. day of November 1916 he sold out his business in bulk to the appellant for \$2873.50 and that the sale included the major part of the goods and chattels of his business as such dairy farmer, and included the property levied upon. The sale was evidenced by a bill of sale. We think it is clear from the evidence, that the sale was in violation of the Bulk Sales Act of 1913, and was therefore fraudulent and void as against the creditors of the vendor, Larson v Juid 200 Ill. App. 430. At the conclusion of all the evidence in the case, the court directed the jury to find the right of the property and the possession thereof to be in the defendant, and the jury thereupon returned the following verdict. "We the jury

These are the first two weeks of the year.

Approved for Release

25

John F. Westerman, Sheriff, supplies.

• L. SPANISH

This is an action of replevin commenced by the respondent, Hugo A. Weakliin, in the Circuit Court of DuPage County against John T. Westman, Sheriff of said county, to recover the possession of certain goods and chattels which had been levied upon by the appellee as sheriff, by virtue of an execution issued upon a judgment against Albert Weakliin, the father of appellant; the judgment was entered by confession in the Circuit Court of said county on the 14th day of December 1918 and the execution was levied upon the goods and chattels involved in this controversy on the 21st day of December 1918. The evidence shows, that the judgment debtor, Albert Weakliin, during the year 1918 was engaged in the business of farming on a farm, which he held in fee simple and which was situated near Naperville, Illinois, in the county mentioned; and that the appellant worked for him; that on the 18th day of November 1918 he sold out his business in bulk to the appellant for \$1875.80 and that the sale included the major part of the goods and chattels of his business as such dairy farmer, and included the property levied upon. The sale was evidenced by a bill of sale. We think it is clear from the evidence, that the sale was in violation of the Bulk Sales Act of 1913, and was therefore fraudulent and void as against the creditors of the vendor, Larson v Lund 200 Ill. App. 430. At the conclusion of all the evidence in the case, the court directed the jury to find the right of the property and the possession thereof to be in the defendant, and the jury thereupon returned the following verdict. "We the jury

find the issues joined in this ~~max~~ cause for the defendant, and that the ownership and right of possession is in the defendant as to the following described property, to-wit: 15 cow, 1 bull, 1 boar, 1 sow, 17 shoats, 6 horses, 3 colts." And the court rendered judgment on the verdict that the defendant have and retain the property in controversy. A judgment was entered on this verdict; and from this judgment an appeal is prosecuted.

It is contended by the appellant that the levy made in this case by the sheriff, under which his right to the property is based, was not legal because he did not give Albert Weakhaines the judgment debtor, ten days after notice of the execution within which to file his schedule of property claimed as exempt from execution before making the levy. It is true that the statute contemplates the allowance of ten days time to the judgment debtor after notice of the execution within which he may file his schedule. *Taylor v Crowe*, 122 Ill. App. 518; but where there is danger that the benefit of an execution may be lost and the purpose for which it was issued may be defeated, as when the debtor is about to abscond and take his property with him; or where the property is about to get out of the reach of the execution, the officer is justified in making a levy at once, the judgment debtor is not thereby deprived of his right to file his schedule within the ten days allowed him; and this can be done after the levy. *Blair v Parker*, 4 Ill. App. 409. But in this case the matter of exempted property was not properly involved. There is nothing shown in the case which indicates, the property in question was exempt; the judgment debtor did not claim it to be exempt; neither did the appellant.

It is also contended by the appellant, that because the verdict finds the ownership of the property in question as well as the right

find the issues joined in this case. For the defendant
 and that the ownership and right of possession is in the defendant
 as to the following described property, to-wit: 15 cow, 1 bull,
 1 bear, 1 sow, 17 sheats, 6 horses, 3 colts. And the court
 rendered judgment on the verdict that the defendant have and
 retain the property in controversy. A judgment was entered on
 this verdict and from this judgment an appeal is prosecuted.
 It is contended by the appellant that the levy made in
 this case by the sheriff, under which his right to the property
 is based, was not legal because he did not give Albert Westman
 the judgment debtor, ten days after notice of the execution within
 which to file his schedule of property claimed as exempt from
 execution before making the levy. It is true that the statute
 requires the allowance of ten days time to the judgment
 debtor after notice of the execution within which he may file
 his schedule. Taylor v. Crowe, 122 Ill. App. 518; but where there
 is a right that the benefit of an execution may be lost and the
 levy made which it was issued may be defeated, as when the
 debtor is about to abscond and take his property with him; or
 where the property is about to get out of the reach of the execu-
 tion, the officer is justified in making a levy at once, the judg-
 ment debtor is not thereby deprived of his right to file his
 schedule within the ten days allowed him; and this can be done
 after the levy. Blair v. Parker, 4 Ill. App. 402. But in this
 case the matter of exempted property was not properly involved.
 That is nothing shown in the case which indicates, the property
 in question was exempt; the judgment debtor did not claim it to
 be exempt; neither did the appellant.
 It is also contended by the appellant that because the verdict
 finds the ownership of the property in question as well as the right
 the jury thereon returned.

of possession in the defendant, that therefore the verdict is erroneous, and against the weight of the evidence. The right of the possession of the property, was all that was necessary for the jury to find; and was a sufficient finding for the purposes of the judgment. The additional finding of ownership in the defendant may therefore be properly regarded as surplusage; especially since the ~~xxxx~~ superfluous finding did no harm to the appellant.

It is also contended, that the trial court erred in permitting the defendant to make the plaintiff his own witness when he was on the witness stand in his own behalf, for the purpose of proving some facts which were properly matters of defense. The order in which testimony is admitted is largely discretionary with the courts in regulating the conduct of the trial. First Nat. Bank v L. E. & W. Ry. Co. 174 Ill. 36. We are of the opinion that the discretion of the trial court was not abused by allowing the testimony complained of to be adduced out of its regular order; nor is it apparent that the plaintiff was harmed thereby. The record does not disclose any substantial error; and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

43 (3852) 9

6576

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213 I.A. 656

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. ~~JOHN~~ JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

Re Hearing Denied Oct 9. 1918

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

6548

31.A.686

IN A TERM OF THE APPELLATE COURT,

at Ottawa, on Tuesday, the second day of April,

CHRISTOPHER C. DUFFY, Clerk.

M. M. DAVIS, Sheriff.

WE HEREBY CERTIFY, that afterwards, to-wit: on

the opinion of the Court was filed in

April 2 1918

the office of said Court, in the words and figures

to-wit:

Gen. No. 5376

213 I.A. 656

Emma Seidel, appellee

vs

Appeal from Co. Ct. Lake.

Edward Rosenblum et al

appellants.

Niehaus, J.

This is a suit by Emma A. Seidel, the appellee against Harry Rosenblum, brought in the County Court of Lake County. The suit was originally instituted against Edward and Harry Rosenblum, doing business as the North Shore Fruit & Produce Co. and Nathan Rosenblum; but afterwards Edward and Nathan Rosenblum were dismissed from the case. The appellee sued to recover for 292 cases of oranges at \$2.85 per case, and for 336 bushels of potatoes at \$3.40 per bushel, and 12 cases of lemons at \$3.50 per case. The appellee testified that the goods mentioned were sold to the appellant Harry Rosenblum at the fixed price mentioned. The appellant did not deny purchasing the potatoes at \$3.40 per bushel but denied that there was any definite price fixed for the oranges; that he took the oranges on joint account; and insisted at the trial, and under his pleadings, that the transaction was a partnership transaction with reference to the oranges with Frank C. Seidel and that the lemons were purchased without any price fixed therefor. He denied that he had any transactions or dealings with the appellee Emma A. Seidel, and therefore did not owe her anything whatever. But the evidence tends to show that Frank C. Seidel, was the agent of the appellee, and acted for her, in all the transactions between the parties. The weight of the evidence in the case appears also to be to the effect, that there was an absolute sale of the goods to the appellant at the definite price ~~not~~ stated, and that he received and disposed of the goods; that he made two payments on

Frank G. Seibel, appellee

vs

Edward Rosenblum et al

appellants.

Milwaukee, W.

Appeal from Co. Ct. Lake.

2131 A. 656

This is a suit by Emma A. Seibel, the appellee against

Harry Rosenblum, brought in the County Court of Lake County.

The suit was originally instituted against Edward and Harry

Rosenblum, doing business as the North Shore Fruit & Produce Co.

and later on Rosenblum, but afterwards Edward and Nathan Rosenblum

were dismissed from the case. The appellee sued to recover for 328

cases of oranges at \$2.85 per case, and for 358 bushels of potatoes

at \$1.15 per bushel, and 12 cases of lemons at \$2.50 per case.

The appellee testified that the goods mentioned were sold to

the appellant Harry Rosenblum at the fixed price mentioned. The

appellant did not deny purchasing the potatoes at \$2.40 per bushel

but denied that there was any definite price fixed for the oranges;

that he took the oranges on joint account; and insisted at the

trial, and under his pleadings, that the transaction was a partner-

ship transaction with reference to the oranges with Frank G. Seibel.

and that the lemons were purchased without any price fixed therefor.

He denied that he had any transactions or dealings with the appellee

Emma A. Seibel, and therefore did not owe her anything whatever.

But the evidence tends to show that Frank G. Seibel, was the agent

of the appellee, and acted for her, in all the transactions between

the parties. The weight of the evidence in the case appears also

to be to the effect, that there was an absolute sale of the goods

to the appellant at the definite price and stated, and that he

received and disposed of the goods; that he made two payments on

account after receiving the goods; one of \$600 and one of \$500 and on his books claimed a credit for drayage of \$9.20 which on the basis of the prices of the goods as testified to by the appellees, left a balance due of \$571.40. There was a trial by jury and a verdict and judgment for \$371.40, which was \$200 less than the amount claimed by the appellee. From the judgment rendered, an appeal is prosecuted.

The principal ground urged for reversal of the judgment is that the court excluded evidence offered by the appellant by which he proposed to prove that the goods which he received were in a damaged condition when he received them, that some of the oranges were rotten, and decayed, and spoiled; and that the court refused to allow the appellant to prove the market value of the goods received by him, in the condition that they were in at the time he received them. We are of opinion that the court properly excluded this evidence. There was no issue presented in the pleadings of any warranty of the quality of the goods. The appellant having received the goods and appropriated them by disposing of them, he is not in position to prevent the seller from recovering the purchase price by claiming that they were not of the quality or description called for by his purchase. The law does not permit a person to receive goods under a contract of sale, appropriate them to his own use by disposing of them, and then defeat an action for the purchase price on the ground that the goods were not of the quality or description agreed upon. His remedy in the absence of a warranty of the goods, was to refuse to take them at the time of delivery, or to return them within a reasonable time after he discovered the defects claimed. *America Theatre Co. v Siegel, Cooper & Co.* 221 Ill. 145, *M. Hommel Wine Co. v Netter* 197 Ill. App. 383; *Norwood v Maremont, Wolfson & Cohen Co.* 183

account after receiving the goods; one of \$200 and one of \$500 and on his books claimed a credit for drayage of \$2.50 which on the facts of the prices of the goods as testified to by the appellant, left a balance due of \$271.40. There was a trial by jury and a verdict and judgment for \$271.40, which was \$200 less the amount claimed by the appellee. From the judgment appellant an appeal is prosecuted.

The principal ground urged for reversal of the judgment is that the court excluded evidence offered by the appellant to prove that the goods which he received were in a better condition when he received them, that some of the goods were rotten, and decayed, and spoiled; and that the court refused to allow the appellant to prove the market value of the goods received by him, in the condition that they were in at the time he received them. We are of opinion that the court properly excluded this evidence. There was no issue presented in the findings of any warranty of the quality of the goods. The appellant having received the goods and appropriated them by disposing of them, he is not in position to prevent the seller from recovering the purchase price by claiming that they were not of the quality or description called for by his purchase. The law does not require a person to receive goods under a contract of sale, and then resell them to his owner by disposing of them, and then defeat an action for the purchase price on the ground that the goods were not of the quality or description agreed upon. His remedy in the absence of a warranty of the goods, was to refuse to take them at the time of delivery, or to return them within a reasonable time after he discovered the defects claimed. Another Textile Co. v. Siegel, Cooper & Co. 221 Ill. 142, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Ill. App. 78. Nor was this evidence competent on the theory which was raised by defendant's pleas; and by the position taken at the trial, that the transaction concerning the oranges was a partnership transaction; for it is evident that if the transaction concerning the oranges was a partnership deal the appellee could not recover at all in an action of assumpsit for anything that might be due her on that account; no warranty was claimed or shown by the evidence. The appellant claimed that a second car of potatoes which he received, after the first one, involved in this controversy, contained some potatoes which were not up to the requirements of the contract he had made with Frank C. Seidel to purchase them; that he called Seidel's attention to the matter, and claimed that he was damaged to the extent of \$300 thereby; that Seidel finally agreed to allow him \$175 as a credit on the amount due for the goods involved in this controversy. The jury seem to have adopted the appellant's version of this matter, and allowed him the full extent of the credit which he claimed. But in all other respects apparently they found for the appellee, and we are of opinion that they were warranted in so doing from the evidence. We find no substantial error in the admission or rejection of evidence; nor in the giving and refusal of instructions. No reversible error is disclosed by the record and the judgment is therefore affirmed.

Judgment affirmed

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

thousand nine hundred and

day of _____ in the year of our Lord one

seal of the said Appellate Court at Ottawa was

In Testimony Whereof I hereunto set my hand and affix the

Court in the above entitled cause of record in my office.

There is no return certifying that the foregoing is a true copy of the minutes of the

in for said Second District of the State of Illinois and keeper of the records

DISTRICT. E. CHRISTOPHER L. DUNN, Clerk of the Appellate

TESTIMONY

6567

254a

213 I.A. 656

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

It is Denied Nov 13. 1918

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 10 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

2181.A. 656

AT A TERM OF THE APPELLATE COURT,

and that at Of was, on Tuesday, the second day of October,
and nine hundred and seven-
ty of the State of

E. DIBBLE, Justice.

Hon. JOHN M. NICHOLS, Justice.

E. O. BUTT, Clerk.

REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the office of said Court, in the words and figures
to-wit:

6567.

Anna Berg, appellee,

vs.

Moline Consumers Company, appellant.)

} 2131A 656
Appellate Court,
court of Moline.

O p i n i o n b y D I B E L L , P. J.

On October 27, 1916, at or near the intersection of Fifth Avenue and Fifteenth Street in the city of Moline, Mrs. Anna Berg was passing from the sidewalk to take a street car then in the middle of Fifth Avenue, when she was struck by an auto truck owned by the Moline Sand Company and driven by its employee. She was knocked down and seriously injured. Thereafter the Moline Sand Company and another corporation were consolidated under the name Moline Consumers Company. Mrs. Berg sued the latter company to recover damages for her injuries. Her right to maintain an action against the latter company is not disputed, if she has a cause of action. She filed a declaration containing five counts wherein she alleged her own due care and stated the negligence of the defendant in various ways, and stated said consolidation. Defendant filed a plea of not guilty, there was a jury trial, plaintiff had a verdict for \$1,999. 99, a motion by defendant for a new trial was denied, plaintiff had judgment and defendant appeals.

It is argued that the court erred in permitting plaintiff to prove that she was a widow and had been for ten years. In answer to one question she stated that she had been married and to another question that her husband was not now living. No objection was made to either of these questions and no motion was made to exclude these answers. The rulings by the court on objections to other questions and answers on this subject are unavailing so long as the evidence above stated

Anna Berg, appellee,

vs.

Moline Gunpowder Company, appellant.

Court of Moline.

Opinion by DIBBLE, P. J.

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Fifth Avenue and Fifteenth Street in the city of Moline,

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car then in the middle of Fifth Avenue, when she was struck by

an auto truck owned by the Moline Sand Company and driven by its

employee. She was knocked down and seriously injured.

Thereafter the Moline Sand Company and another corporation were

consolidated under the name Moline Gunpowder Company. Mrs.

Berg sued the latter company to recover damages for her in-

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a verdict for \$1,999.99, a motion by defendant for a new

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It is argued that the court erred in permitting plaintiff

to prove that she was a widow and had been for ten years.

In answer to one question she stated that she had been married

and to another question that her husband was not now living.

No objection was made to either of these questions and no

motion was made to exclude these answers. The rulings by the

court on objections to other questions and answers on this

subject are unavailing as long as the evidence thus stated

remained in the record without objection. Objection was made to her stating that she had been a widow for ten years. Her daughter, a married woman living with her husband, testified that her mother had lived with her for ten years and was so living at the time of the injury and since. We conclude that under this evidence we are not called upon to discuss the question whether the court erred in its other rulings on the subject of plaintiff's widowhood.

At the close of plaintiff's evidence defendant made a motion to direct a verdict for it, and this was denied, and that ruling is assigned for error. Thereafter defendant introduced other proof. By introducing said evidence defendant waived that motion and cannot now assign that ruling for error. *Wolf Co. v. Refrigerating Company*, 252 Ill. 491, and cases there cited.

At the close of all the evidence defendant moved to direct a verdict for it, and that motion was denied and that ruling is assigned for error. The motion was based on two grounds, lack of due care or noncontributory negligence of plaintiff, and lack of proof of negligence of the driver of the truck. Defendant's contention is that as a matter of law it was the duty of plaintiff to look to see if a vehicle was approaching, and as this was in the daytime and the auto was approaching but a short distance away, she either saw it and went on regardless of her duty to wait, or else she did not look, and that in either case, she is barred of a recovery. The law of this State is not as stated, Whether there is an imperative duty upon a person entering a street, as Mrs Berg was, to look and listen depends upon the surrounding circumstances, and it is a question for the jury to determine whether the person injured did look or was ~~xxxxxxx~~excused from looking. What is due care and caution in a particular case depends upon all the conditions

far case depends upon all the conditions from looking. What is due care and caution in a particular case depends upon the surrounding circumstances, and it is a question for the jury to determine whether the person accused did look or was excused from looking. The law of this State is not as stated. Whether there is an issue, and that in either case, she is barred of a recovery. Went on regardless of her duty to wait, or else she did not approach at a short distance away, she might see it and approaching, and as this was in the daytime and the auto was in the track. Defendant's contention is that as a matter of law it is plaintiff's, and lack of proof of negligence of the driver of plaintiff, lack of due care or contributory negligence of plaintiff is assigned for error. The motion was based on two rulings assigned for error, and that motion was denied and that a verdict for it, and the evidence defendant moved to disallow and cases there cited. Wolf Co. v. Retiring Company, 228 Ill. 401, error. That ruling is assigned for error. The evidence defendant made a motion to direct a verdict for it, and this was denied, and subject of plaintiff's widowhood. In question whether the court erred in its other rulings on the fact that this evidence was not called upon to discuss the fact that her mother had lived with her for ten years and was her daughter, a married woman living with her husband, testified to her stating that she had been a widow for ten years. remained in the record without objection. Objection was

and circumstances surrounding the person at the time he is called upon to act. Mrs. Berg had a right to assume that any one driving a vehicle upon that crossing, which was a crowded crossing in the heart of the city, would exercise a greater degree of care than at other places. These principles are laid down and illustrated in Henry v. C.C. & St. L. Ry. Co., 236 Ill. 219; Rosenthal v. C. & A. R. R. Co., 255 Ill. 552; Weidenreich v. Bremner, 260 Ill. 439; and other cases there cited. Fifth Avenue in the city of Moline runs substantially east and west and Fifteenth Street crosses it at right angles. That is the most used crossing in the city and is most ^{crowded} ~~crossed~~ between the hours of four and six P. M. and this accident occurred during that time. Mrs. Berg had been shopping and was carrying a number of bundles and was waiting near the south east corner of said intersection for a street car to come from the east of Fifth Avenue, which she wished to take. The car came and stopped just before it reached the east line of Fifteenth Street. Mrs. Berg was to enter the car at the rear door on the north side. The south side of the body of the car was fifteen feet from the curb. A little ways east of the south side of Fifth Avenue an automobile was parked. Mrs. Berg testified that she started from the curb a short distance East of the East line of Fifteenth Street and went in a Northeasterly direction to go around the rear of the car. She was corroborated in that, Others testified that she was on the cross walk on the east side of Fifteenth Street, which would bring her around the head of the car. The street was crowded. She testified that she looked and did not see any vehicle approaching her from the west. If she was on the cross walk, two foot passengers were approaching her from the north on

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from looking.

that cross walk. Others were standing on the sidewalk. The truck was approaching from the west and, if she had looked directly at it, she could have seen it. She either did not see it, or thought she had time to cross ahead of it, or thought its driver would slacken its speed so that she could cross. The jury had a right to consider the crowded condition of the street, her attention directed to the coming car, which according to some of the testimony had not yet stopped when she was struck, her obvious desire to reach that car before it started again, and the duty of the driver of the truck to have it under control at that point. We are of opinion that the court was not authorized to decide as a matter of law that Mrs. Berg was guilty of contributory negligence which would preclude a recovery but that that was a question to be submitted to the jury. Though not loaded, the truck weighed 9400 pounds. The driver saw people on the cross walk when he was upon the street car track in the middle of Fifteenth Street, which was more than 28 feet from the cross walk where he claims Mrs. Berg was, and 40 or 50 feet from her, if she was where she claimed she was. He claims that he sounded his horn several times and he was corroborated on that point. Mrs. Berg and another witness testified that they did not hear the horn. He testified that then he sounded it the second time, the people going south on the cross walk stopped and that he supposed that Mrs. Berg would stop. He testified that he had the right of way as against the people going south and, though he did not say that he considered that he had the right of way as against Mrs. Berg, yet the jury may well have believed that that was the attitude of his mind at the time. He was going at such a speed that when he found Mrs. Berg did not notice his car he was unable to stop it with all the appliances

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at his command, and the front of his car passed several feet beyond where Mrs. Berg fell in the street before he could stop it. The reasonable care required of such a driver in running his vehicle imposes upon him a more exacting attention when he approaches a street crossing in a crowded city. *Heidenreich v. Bremner* supra; *Chicago City Ry. Co. v. Fennimore*, 199 Ill. 9; *Chicago City Ry. Co. v. Tuohy*, 196 Ill. 410, and cases there cited. We think the jury were clearly warranted in finding that the driver of this heavy truck was not in the exercise of the care required of him as he went over this street crossing.

Complaint is made that the giving of instructions Nos. 6 and 7, requested by plaintiff. No. 6 told the jury that to enable the jury to estimate the amount of plaintiff's damages, if the jury found for her, it was not necessary that any witness should have expressed an opinion as to the amount, but the jury could themselves make such estimate from the evidence, in connection with their knowledge, observation and experience. This statement was correct so far as related to physical injuries, future suffering and future permanent injury, not capable of pecuniary measurement. But the declaration also set up loss of time and expense of being cured. The amount of such damages was capable of being established by proof. It is argued that it was error to give this instruction without excluding therefrom such damages as were capable of pecuniary measurement. We so held in a somewhat similar case in *Harley v. A. E. & C. Ry. Co.*, 149 Ill. App. 339. The giving of such an instruction was held incorrect but not reversible error in *North Chicago St. Ry. Co. v. Fitzgibbons*, 180 Ill. 466; *Richardson v. Nelson*, 221 Ill. 254; *Keokuk Bridge Co. v. Wetzell*, 228 Ill. 253. In *Thompson v. Northern Hotel Co.*, 258 Ill. 77, where a similar instruction was strenuously objected to, and where the possible amount that might be allowed thereunder without evidence was \$500, it was held

at his count, and the front of his car passed several feet beyond where Mrs. Berg fell in the street before he could stop it. The reasonable care required of such a driver in running his vehicle imposes upon him a more exacting attention when he approaches a street crossing in a crowded city. *Heidenreich v. Bremer*, Chicago City Ry. Co. v. Tennessee, 192 Ill. 9; *Chicago City Ry. Co. v. Troby*, 192 Ill. 410, and cases there cited. We think the jury were clearly warranted in finding that the driver of this heavy truck was not in the exercise of the care required of him as he went over this street crossing. Complaint is made that the giving of instructions Nos. 6 and 7, requested by plaintiff. No. 6 told the jury that to enable the jury to estimate the amount of plaintiff's damages, if the jury found for her, it was not necessary that any witness should have expressed an opinion as to the amount, but the jury could themselves make such estimate from the evidence, in connection with their knowledge, observation and experience. This statement was correct so far as related to physical injuries, future suffering and future permanent injury, not capable of pecuniary measurement. But the declaration also set up loss of time and expense of being sued. The amount of such damages are capable of being established by proof. It is argued that it was error to give this instruction without excluding therefrom such damages as were capable of pecuniary measurement. We so held in somewhat similar case in *Harley v. A. E. & C. Ry. Co.*, 148 Ill. App. 339. The giving of such an instruction was held incorrect but not reversible error in *North Chicago St. Ry. Co. v. Winter*, 180 Ill. 466; *Richardson v. Nelson*, 221 Ill. 284; *Knock Bridge Co. v. Wetzel*, 228 Ill. 253. In *Thompson v. Northern Tote Co.*, 228 Ill. 77, where a similar instruction was strenuously objected to, and where the possible amount that might be allowed thereunder without evidence was \$500, it was held

that the instruction would not be understood by the jury as authorizing them to estimate and allow damages capable of pecuniary measurement without any evidence upon which to base such estimate. Moreover, in this case instructions given for defendant required the jury to determine the case solely upon the evidence introduced, and forbade them to indulge in speculation or conjecture not supported by the evidence. The cases above cited from our supreme court are based in part upon the conclusion that the damage not so excluded from the instruction were slight and the verdict moderate. Here the reasonable charge of the physician for his attendance upon plaintiff because of this accident was testified to by the physician. The evidence showed that Mrs. Berg was removed to a city hospital, but it did not show that she incurred any personal liability therefor. Apparently she was soon after removed to her daughter's home. She did lose time, but she was about 66 years of age at the time of the trial, and she had been living for years at her daughter's home, assisting about the housework, and there was no suggestion that these services were of any pecuniary value to her or that she lost any money value by not being able to render them. The verdict is for a reasonable sum in view of the injuries she sustained, and we conclude, in harmony as we think with the cases above cited, that the jury were not likely to be misled into allowing anything for lost time. These suggestions also dispose of what is said against instruction No. 7. The court refused several instructions requested by defendant. One of them, though obscure, might perhaps properly have been given, but it was covered sufficiently by the given instructions. Each of the other refused instructions states the law defectively or incorrectly. We find

that the instruction would not be understood by the jury as authorizing them to estimate and allow damages capable of pecuniary estimation without any evidence upon which to base such estimate. Moreover, in this case instructions given for defendant required the jury to determine the case solely upon the evidence introduced, and forbade them to indulge in speculation or conjecture not supported by the evidence. The cases above cited from our supreme court are based in part upon the conclusion that the cases not so excluded from the instruction were slight and the verdict moderate. Here the reasonable charge of the physician for his attendance upon plaintiff because of this accident was testified to by the physician. The evidence showed that Mrs. Sig was removed to a city hospital, but it did not show that she incurred any personal liability therefor. Apparently she was never after removed to her daughter's home. She did lose time, but she was about 66 years of age at the time of the trial, and she had been living for years at her daughter's home, assisting about the housework, and there was no suggestion that there services were of any pecuniary value to her or that she lost any money value, not being able to render them. The verdict is for a reasonable sum in view of the injuries she sustained, and we conclude, in harmony as we think with the cases above cited, that the jury were not likely to be misled into allowing anything for lost time. These suggestions also dispose of what is said in that instruction No. 7. The court refused several instructions requested by defendant. One of them, though obscure, might perhaps properly have been given, but it was covered sufficiently by the given instructions. Each of the other refused instructions states the law defectively or incorrectly. We find

7
no reversible error in the rulings on the instructions.

We are of opinion that, under the evidence, a verdict for the plaintiff for the sum named, approved by the trial judge, should not be reversed by upon upon the facts? If the jury had found the plaintiff negligent and the trial judge had approved that finding, a different question would be presented.

The judgment is therefore affirmed.

...no reversible error in the rulings on the instructions.
We are of opinion that, under the evidence, a verdict for
the plaintiff for the sum named, approved by the trial judge, should
not be reversed by upon upon the facts? If the jury had
the plaintiff negligent and the trial judge had approved that
finding, a different question would be presented.
The argument is therefore affirmed.
...so excluded from the instruction was all that was
...the responsible change of the
...upon plaintiff's because of this fact
...by the physician.
...to a city hospital, but it did not show that
...personal liability therefor.
...removed to her daughter's home.
...was about 65 years of age at the time of the injury, and
...living for years at her daughter's home, and
...housework, and there was no suggestion that
...of any pecuniary value to her or that she
...value by not being able to render them.
...of the injured was
...in harmony as we think with the
...jury were not likely to be misled
...time. These instructions are
...The court
...requested by defendant.
...perhaps properly have been given, but
...by the given instructions.
...and long states the law and equity of the case

STATE OF ILLINOIS, { SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. } and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



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213 I.A. 656

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 10 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6563.

E. B. Conover, et al.

213 I.A. 656

appellees.

vs

Appeal from Peoria.

Cleveland, Cincinnati, Chicago

& St. Louis Ry. Co.

appellant.

Carnes, J.

This is an action on the case against the initial carrier for damage to eight carloads of corn caused, it is claimed, by holding it in transit in closed cars an unreasonable length of time, and into the germinating period in the warm weather of spring, when it heated and depreciated in quality. Most of the questions are the same discussed and decided in Mueller Grain Company v Lake Erie and Western Railroad Company, Gen. No. 6562. The facts are similar and much of the evidence substantially the same. The opinion filed in that case makes unnecessary extended comment here on questions there discussed.

The facts as claimed by appellee, E. B. Conover Grain Company (plaintiff below) are that at different dates on and soon after February 17, 1916, they shipped corn over appellant's road from Peoria-Illinois, to Baltimore Maryland; that the usual time for such transportation is ten to twelve days; that the following table shows the number of the cars, the amount of moisture, and the grade at Peoria, the grade at Baltimore, the time in transit, and the damage:

2131.A.656

Gen. No. 6568.

E. B. Conover, et al.

appellees.

Amended First Petition.

vs

Grain Growers, et al.,

appellees.

Grain, et al.

This is an action on the case against the initial carrier for damage to eight carloads of corn caused, it is claimed, by holding it in transit in closed cars an unreasonable length of time, and into the germinating period in the warm weather of spring, when it heated and deteriorated in quality. Most of the questions are the same discussed and decided in *Muelter Grain Company v Lake Erie and Western Railroad Company*, Gen. No. 6568. The facts are similar, and much of the evidence substantially the same. The opinion filed in that case makes unnecessary extended comment here on questions there discussed.

The facts as claimed by appellee, E. B. Conover Grain Company (plaintiff below) are that at different dates on and soon after February 17, 1916, they shipped corn over appellant's road from Peoria Illinois, to Baltimore Maryland; that the usual time for such transportation is ten to twelve days; that the following table shows the number of the cars, the amount of moisture, and the grade at Peoria, the grade at Baltimore, the time in transit, and the damage:

<u>Car.</u>	<u>Moisture at</u> <u>Peoria.</u>	<u>Grade at</u> <u>Peoria.</u>	<u>Grade at Baltimore</u> <u>Before Drying.</u>	<u>Transit</u>	<u>Damage.</u>
50926	21.4%	No. 5	No established grade very damp.	31 d.	\$150.
54309	21.4%	No. 5	Rejected, very damp. warm.	34 "	\$390.
44493	20.8%	No. 5	N.E.G. Very damp.	18 "	\$150.
34378	19.5%	No. 5	Steamer, damp.	29 "	\$ 42.
4187	20.7%	No. 5	Steamer, damp.	34 "	\$ 35.
98916	21.5%	No. 5	Rejected, extremely damp.	34 "	\$375.
4043	19 %	No. 5	N.E.G. Very damp Rejected.	32 "	\$100.
20728	20.2%	No. 5	Molly and warm	43 "	\$375. \$1617.

Appellant assumes the facts as there stated except the column indicating damages, but denies liability for any damage, and says in any view of the law the damages awarded are excessive. The verdict and judgment was \$891.07, a little over one half what appellee claims

A reversal is asked for the same five reasons urged in *Mueller Grain Company v Lake Erie and Western Railroad Company* supra, and except the fifth, are answered in the same way. The point that the rule of damages applicable to delayed shipments should have been adopted is further answered by noting that the court at the instance of appellant instructed the jury that "the measure of damages would be the difference in the fair cash market value of the corn in the condition in which it did arrive and its fair cash market value in the condition in which it should have arrived, taking into consideration the condition of such corn when delivered by the railroad company as shown by the evidence." which was more likely to be understood as announcing the rule adopted in suits for damage in transit.

On the question of the condition of the corn at Baltimore appellant offered evidence, that the court excluded, showing the weight and grade of the corn at Baltimore sometime after it was

Car. Material at Feoria.		Grain at Feoria.		Grain at Baltimore Before Dividing.		Grain at Baltimore After Dividing.	
200.00	21.4%	No. 5	No. 5	No. 5	No. 5	No. 5	No. 5
213.00	21.4%	No. 5	No. 5	No. 5	No. 5	No. 5	No. 5
444.00	20.8%	No. 5	No. 5	No. 5	No. 5	No. 5	No. 5
343.75	17.5%	No. 5	No. 5	No. 5	No. 5	No. 5	No. 5
110.7	10.7%	No. 5	No. 5	No. 5	No. 5	No. 5	No. 5
222.15	21.5%	No. 5	No. 5	No. 5	No. 5	No. 5	No. 5
100.00	10.0%	No. 5	No. 5	No. 5	No. 5	No. 5	No. 5
200.00	20.0%	No. 5	No. 5	No. 5	No. 5	No. 5	No. 5

Appellant assumes the facts as there stated except the column in-
dicating damages, but denies liability for any damage, and says in
any view of the law the damages awarded are excessive. The ver-
dict and judgment was \$891.07, a little over one half what ap-
pellee claimed. The Grain Company v Lake Erie and Western Railroad Company
A reversal is asked for the same five reasons urged in
Grain Company v Lake Erie and Western Railroad Company
and except the fifth, are answered in the same way. The
point that the rule of damages applicable to delayed shipments
should have been adopted is further answered by noting that
the court at the instance of appellant instructed the jury
that "the measure of damages would be the difference in the
fair cash market value of the corn in the condition in which
it had arrived and its fair cash market value in the condition
in which it should have arrived, taking into consideration
the condition of such corn when delivered by the railroad
company as shown by the evidence." which was more likely to be
understood as announcing the rule adopted in suits for damage
in transit.

On the question of the condition of the corn at Baltimore
appellant offered evidence, that the court excluded, showing the
weight and grade of the corn at Baltimore sometime after it was

delivered, and after it had been subjected to the drying process. This evidence showed all but one car graded "prime sail" after drying. We think the ruling correct for reasons stated in the former opinion, and it may be added that there was no offer to show the cost of converting the corn from "rejected" to "prime sail" grade. If the jury were expected to disregard the market value and find the intrinsic value from evidence that the corn was converted into some other form or grade, it was necessary to show what the cost of the conversion was. On the question of the amount of the verdict it does not appear that the jury adopted 33¢ a bushel as the difference in the market price between "rejected" and "prime sail" corn at Baltimore. Appellant says they did perhaps adopt "prime sail" corn as a standard from which to make the discount of from 25¢ to 33¢ instead of taking the lower standard or the price of "steamer" corn; but appellants counsel say "As the record stands with the after drying certificate excluded it indicates that appellee suffered loss on account of his corn grading below "prime sail". We think that is a correct statement, although, as in the former case, there may be said to be a question for the jury whether the corn in its condition at Peoria would have graded "prime sail" or "steamer" corn, and, as in that case, we cannot say the verdict was against the preponderance of the evidence on that question. Appellant bases its contention that the verdict is excessive mainly on the argument that no damage should have been allowed except on the one carload of corn that could not, in the drying process, be changed from "rejected" to "prime sail". We do not agree with this contention and see no grounds for holding the verdict excessive. The judgment is affirmed.

Affirmed.

Niehause Jas took no part.

...and after it had been subjected to the drying process
This evidence showed that one ear graded "prime ear" after
drying. We think the drying correct for reasons stated in the
former opinion, and it may be added that there was no offer to
show the cost of converting the corn from "rejected" to "prime
ear" grade. If the jury were expected to disregard the market
value and find the intrinsic value from evidence that the
corn was converted into some other form or grade, it was
necessary to show what the cost of the conversion was. On the
question of the amount of the verdict it does not appear that
the jury adopted 13¢ a bushel as the difference in the market
price between "rejected" and "prime ear" corn at Baltimore.
A point may be made that perhaps about "prime ear" corn is a
standard from which to make the discount of from 25¢ to 35¢
instead of taking the lower standard or the price of "steamer"
corn; but a witness counsel say "As the record stands with
the other drying certificate excluded it indicates that appellee
suffered loss on account of his corn grading below "prime ear".
We think that is a correct statement, although, as in the former
case, there may be said to be a question for the jury whether
the corn in its condition at Peoria would have graded "prime
ear" or "steamer" corn, and, in that case, we cannot say
the verdict was against the preponderance of the evidence on
that question. Appellant bases its contention that the verdict
is excessive mainly on the argument that no damage should have
been allowed except on the one earload of corn that could not
in the drying process, be changed from "rejected" to "prime
ear". We do not agree with this contention and see no grounds
for holding the verdict excessive. The judgment is affirmed.

Affirmed.

On the motion of the defendant the jury took no part.

Weight and measure of the corn at Peoria.

STATE OF ILLINOIS, { SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

thousand nine hundred and
sent of the said Angelus Court in
[A Testimony Witness, I declare
lost of record in my office.
(11) that the foregoing is the
Second District of the State of
District of the State of
and also the

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213 I.A. 657

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 10 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE APPELLATE COURT,

on Tuesday, the second day of October,
the Lord one thousand nine hundred and seven-
and for the Second District of the State of

DUTTY

erill...

MEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in

1918

the office of said Court, in the words and figures

to-wit:

Gen. No. 6570.

Mueller Grain Company,

appellee

213 I.A. 657

vs

Appeal from Peoria.

Chicago, Burlington & Quincy

Railroad Co. appellant.

Garnes, J.

This is an action on the case to recover damages on a shipment of two carloads of corn from Peoria Illinois to Baltimore Maryland. The aggregate weight was 126,000 pounds at Peoria, and 119,300 pounds at Baltimore. The corn was delivered to appellant at Peoria February 17, 1916, was 82 days in transit delivered at Baltimore May 10, 1916. It graded No. 5 at Peoria and at Baltimore one car "rejected" corn, "hot and rotten" and the other "rejected". "Damp, damaged, musty, moldy and hot". There is substantially the same evidence as in Mueller Grain Company v Lake Erie and Western Railroad Company, Gen. No. 6562 as to the usual time of transportation, the effect of holding corn in closed cars into the warm spring weather, and the difference in market value between "rejected" and "prime sail" corn at Baltimore, and the same contention as to liability of the carrier. There was a verdict of \$630.04 for the plaintiff. A remittitur of \$34.33 was filed and judgment entered for \$795.71. Counsel for appellee say they reached this sum by computation, but do not say how. There was evidence that the market price of "prime sail" corn at Baltimore was 79½¢ a bushel on May 10, 1916. The computation must have been on the basis of that price for the loss in weight, and 33¢ a bushel for damage to the remainder, instead of 25¢ a bushel; therefore there was included in the judgment 8¢ per bushel on damaged corn not warranted by the evidence,

8¢ per bushel on damaged corn not warranted by the evidence, of 25¢ a bushel; therefore there was included in the judgment weight, and 33¢ a bushel or damage to the remainder, instead must have been on the basis of that price for the loss in timore was 78¢ a bushel on May 10, 1916. The computation evidence that the market price of "prime sail" corn at Baltimore was by computation, but do not say how. There was entered for \$798.71. Counsel for appellee say they reached the plaintiff. A remittitur of \$34.35 was filed and judgment liability of the carrier. There was a verdict of \$830.04 for "prime sail" corn at Baltimore, and the same contention as to the difference in market value between "rejected" and holding corn in closed cars into the warm spring weather, and 66¢ as to the usual time of transportation, the effect of Company v Lake Erie and Western Railroad Company, Gen. No. There is substantially the same evidence as in Mueller Grain and the other "rejected". "Damp, damaged, musty, moldy and hot". and at Baltimore one car "rejected" corn, "hot and rotten" delivered at Baltimore May 10, 1916. It graded No. 2 at Peoria to appellant at Peoria February 17, 1916, was 82 days in transit Peoria, and 119,300 pounds at Baltimore. The corn was delivered timore Maryland. The aggregate weight was 126,000 pounds at shipment of two carloads of corn from Peoria Illinois to Baltimore.

This is an action on the case to recover damages on a appeal from Peoria. vs Chicago, Burlington & Quincy Railroad Co. appellant. Counsel, J. J. Guinness, Jr.

Gen. No. 6570. Mueller Grain Company, appellee. 2131.A.657

for the reasons stated in Gen. No. 6562. Appellant says there was 2131 bushels in both cars at Baltimore, which seems substantially correct. At 80 a bushel that gives an excess of \$170.48 in the judgment.

Appellant says "No allowance is made for lost grain as the bill of lading requires that lost grain shall be accounted for on the basis of its value at the time and place of shipment. There is no evidence showing such value." This is all that is said on that question by either party. The bill of lading is set out in full in the abstract. To pass intelligently on that question we must find the provision referred to and examine other provisions in the bill, and then compare the Cummins amendment with the Carmack amendment as to the effect of the provisions in those two acts against limiting the carrier's liability by contract, and examine the many decisions of Federal and State courts on the question as presented under the Carmack amendment. The Cummins amendment is so recent that decision s under it should be searched for in the latest digests. We do not feel inclined to undertake this task entirely unaided by counsel. If the loss in weight between the two points of shipment and delivery should be disregarded for the reason suggested that there is no proof of market price at Peoria, opportunity should be afforded appellee to make such proof, if desired, on another trial. We assume that appellant's counsel did not regard the point of much importance, and hold it not well taken.

For reasons stated in the opinion in Gen. No. 6562, we conclude there is no reversible error in the record except that the verdict is excessive.

This opinion will be lodged with the clerk of the court and if appellee files a remittitur within five days in the sum of

for the reasons stated in Gen. No. 6562. Appellant says there was also a loss in both ears at Baltimore, which seems substantially correct. At 80 a bushel that gives an excess of \$170.48 in the judgment.

Appellant says "No allowance is made for lost grain as the bill of lading requires that lost grain shall be accounted for on the basis of its value at the time and place of shipment."

There is no evidence showing such value. This is all that is said of that question by either party. The bill of lading is set out in full in the abstract. To pass intelligently on that question we must find the provision referred to and

examine other provisions in the bill, and then compare the

Carroll amendment with the Carroll amendment as to the effect

of the provisions in those two acts against limiting the carrier's liability by contract, and examine the many decisions of Federal

and State courts on the question as presented under the Carroll

amendment. The Carroll amendment is so recent that decision

under it should be sought for in the latest Digest. We do

not feel inclined to undertake this task entirely unaided by

counsel. If the loss in weight between the two points of

shipment and delivery should be disregarded for the reason

suggested that there is no proof of market price at Peoria,

opportunity should be afforded appellee to make such proof, if

desired, on another trial. We assume that appellant's counsel

did not regard the point of much importance, and hold it not

well taken.

For reasons stated in the opinion in Gen. No. 6562, we con-

clude there is no reversible error in the record except that the

verdict is excessive.

This opinion will be lodged with the clerk of the court and

it appellee files a remittitur within five days in the sum of

\$4 per bushel on the loss in weight between the two points of

\$170.48 the judgment will be affirmed in the sum of \$635.23 at appellee's costs; otherwise the judgment will be reversed and the cause remanded.

Niehaus J. took no part.

Appellee having filed herein a remittitur in the sum of \$170.48 the judgment is therefore affirmed in the sum of \$635.23 at the costs of appellee.

the judgment will be affirmed in the sum of \$525.25 as
 costs; otherwise the judgment will be reversed and
 the costs remanded.

It is so ordered.

A perusal of the record in the sum of \$170.48
 the judgment is therefore affirmed in the sum of \$525.25 as the

costs of appeal. It is so ordered.

Other provisions in the bill, and those which

do not relate to the subject of the bill, are

not to be considered, and the bill is amended so

that it shall be in conformity with the

provisions of the act of March 3, 1879.

It is so ordered.

It is so ordered.

It is so ordered.

It is so ordered.

It is so ordered.

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

THOMAS J. WATSON, Esq.,
District of the State of Illinois, and
that the foregoing is a true and
correct copy of the original
of record in my office.
In Testimony Whereof, I have hereunto
set of my hand and official seal
this 1st day of May, 1884.
Witness my hand and seal at
Chicago, Illinois, this 1st day of May, 1884.

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2131.A. 657

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 10 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

657

AT A TERM OF THE APPELLATE COURT,

held at Ottawa, on Tuesday, the second day of October,
at our Lord one thousand nine hundred and seven-
for the Second District of the State of

DUANE J. CARRIES, President Justice.

HON. DORRANCE DIBBLE, Justice.

HON. JOHN M. NIEHAUS, Justice.

CHRISTO

THIRD, that afterwards, to-wit: on
the opinion of the Court was filed in
the office of said Court, in the words and figures
to-wit:

Gen. No. 6571.

E. B. Conover, et al
appellees.

213 I.A. 657

vs Appeal from Peoria.

Wandalia Railroad Company,
appellant.

Carnes J.

This is the last considered in the four cases mentioned in the opinion in Mueller Grain Company v Lake Erie & Western Railroad Company. Gen. No. 6562. The same questions are presented and are answered in the same way except as to the amount of damages. There were eight carloads of corn shipped from Peoria, Illinois, to Baltimore, Maryland, at various dates from February 9, 1916, to March 2, 1916. The time in transit was respectively 16 days, 38 days, 28 days, 33 days, 70 days, 70 days, and 70 days. Two carloads graded No. 4, and six No. 5 at Peoria. Four carloads graded "steamer" corn at Baltimore, one car "No established grade, very damp", and three carloads "rejected". The evidence that grades Nos. 4 and 5 at Peoria should grade "prime sail" at Baltimore and the difference in market price of the various grades at Baltimore, is substantially the same as in the Mueller Grain Company case, above mentioned. Appellees in their brief do not attempt to definitely state what damage they were entitled to under the evidence, but say under count one the damage was about \$45; count two approximately \$30; count three approximately \$42; count four about \$30; count five from ~~\$150~~ \$105 to \$160; count six from \$375. to \$500; count seven \$400. to \$550; count eight \$260 to \$350. Adopting their lowest estimate the aggregate damage was \$1287. Under, their highest it was \$1707. Plaintiffs (appellees) had a verdict and judgment for \$1550. This could not have been

2131.A.657

Gen. No. 6571.

E. L. Conover, et al

appellants.

Appeal from Peoria.

vs

Unionville Railroad Company.

appellant.

Case 1.

This is the last considered in the four cases mentioned in the opinion in Mueller Grain Company v Lake Erie & Western Railroad Company, Gen. No. 6562. The same questions are presented and are answered in the same way except as to the amount of damages. There were eight carloads of corn shipped from Peoria, Illinois, to Baltimore, Maryland, at various dates from February 9, 1916, to March 2, 1916. The time in transit was respectively 16 days, 38 days, 38 days, 33 days, 70 days, 70 days, and 70 days. Two carloads graded No. 4, and six No. 5 at Peoria. Four carloads graded "steamer" corn at Baltimore, one car "No established grade, very damp", and three carloads "rejected". The evidence that grades Nos. 4 and 5 at Peoria should grade "prime sail" at Baltimore and the difference in market price of the various grades at Baltimore, is abundant-ly the same as in the Mueller Grain Company case, above mentioned. Appellants in their brief do not attempt to definitely state what damage they were entitled to under the evidence, but say under count one the damage was about \$45; count two approximately \$30; count three approximately \$42; count four about \$20; count five from \$100 to \$160; count six from \$275 to \$500; count seven \$400. to \$550; count eight \$280 to \$350. Adopting their lowest estimate the aggregate damage was \$1387. Under, their highest it was \$1707. Plaintiffs (appellants) had a verdict and judgment for \$1350. This could not have been

reached without in part adopting the highest estimate in evidence like that discussed in the Mueller Grain Company case, where it was uncertain whether the discount was 25¢ or 33¢. We think the verdict is excessive for that reason. We conclude the evidence only supports a verdict for \$1287, the largest amount that appellees claim is positively proven; therefore the difference between that sum and \$1560, the amount of the judgment, or \$263. should be remitted. For reasons stated in the foregoing three opinions in which practically the same arguments and practically the same facts are discussed, we conclude the record does not, in any other respect, disclose reversible error.

This opinion will be lodged with the clerk of the court and if appellee file a remittitur within five days in the sum of \$263. the judgment will be affirmed in the sum of \$1287. at appellees' costs; otherwise the judgment will be reversed and the cause remanded.

Nichaus J. took no part.

Appellee having filed herein a remittitur in the sum of \$263. the judgment is therefore affirmed in the sum of \$1287 at the costs of appellees.

referred without in part adopting the right of estate in
 evidence like that discussed in the *Miller* case.
 case, where it was uncertain whether the amount was \$25
 or \$35. We think the verdict is excessive for that reason.
 We conclude the evidence only supports a verdict for \$187.
 the largest amount that appellees claim is positively proven;
 therefore the difference between that sum and \$1250, the amount
 of the judgment, or \$263, should be remitted. For reasons stated
 in the foregoing three opinions in which practically the same
 arguments are presented, we are of the opinion that the
 verdict the record does not, in any other respect, disclose
 reversible error. There were eight errors of law assigned.
 This opinion will be lodged with the clerk of the court
 and if appellee files a remittitur within five days in the sum
 of \$263, the judgment will be affirmed in the sum of \$187. If
 appellees' costs; otherwise the judgment will be reversed and
 the costs remitted. Graded statement" torn at bottom.
 Nicholas J. took no part. "very long" in three columns.
 The evidence that grades Nos. 4 and 5 at Point
 appellee having filed herein a remittitur in the sum of \$263.
 the judgment is therefore affirmed in the sum of \$187 at the
 costs of appellees.
 Appellees in their brief... to affirmatively
 state that damage was done...
 any major county...
 approximately \$30; costs...
 \$30; costs five to...
 \$25 to \$30; costs...
 \$250. Adopting their...
 \$187. Under, their...
 had a verdict and judgment for \$187. This could not be done

STATE OF ILLINOIS, }
SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

725 625 425 125

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6549

258a

213 I.A. 657

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. ~~JOHN~~ M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 10 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

2131

IN A COURT OF THE STATE OF NEW YORK

... held at ... on Tuesday, the second day of October, ... of our Lord one thousand nine hundred and seven- ... for the Second District of the State of

Hon. DUANE J. GARNES, President Justice.
Hon. JORRANCE BIRRELL, Justice.
Hon. JOHN M. NICHOLS, Justice.
Hon. ROBERT C. DUFFY, Clerk.
Hon. ... Sheriff.

1918
... the opinion of the Court was filed in ... the words and figures ... to-wit:

Nellie L. Francis, et al.,

Appellees

vs.

A. B. Sheadle, et al.,

Appellants.)

213 I.A. 657

Appeal from Circuit Court
Ogle County.

Opinion by NIEHAUS, J.

In this case the appellees, Nellie L. Francis, Ida M. Francis and Willis G. Francis, children of Alfred G. Francis, a brother of Theron D. Francis, deceased, filed a Bill in Equity as residuary devisees and legatees, under the ~~last~~ will of Theron D. Francis, for a construction of his will, and an accounting for the personal property of the testator, or the value thereof, from the Estate of Hannah Maria Francis, deceased, the widow of said testator. Theron D. Francis died testate January 31, 1905, in Ogle County, leaving real and personal property; the last will was duly probated. The following provisions were made in the will by the testator concerning the disposition of the estate:

2nd: "I give and bequeath to my sister Mrs. Emily L. Pickford an annuity of One Hundred (\$100.) Dollars to be paid yearly during her natural life.

3rd: I give and bequeath to my cousin Mrs. Sarah L. Mills an annuity of Fifty (\$50.) Dollars to be paid yearly during her natural life.

4th: I give, bequeath and devise to my beloved wife Hannah Maria Francis and her heirs and assigns one third ($1/3$) of all my real estate to be selected by her. I further give and bequeath to my said wife Hannah Maria

2131A.657

Appeal from Circuit Court
Ogle County.

Nellie L. Francis, et al.,

Appellees

vs.

A. S. Sheddle, et al.,

Appellants.

Opinion by NICHOLS, J.

In this case the appellees, Nellie L. Francis, Ida M. Francis and Willis G. Francis, children of Alfred G. Francis, a brother of Theron D. Francis, deceased, filed a Bill in Equity as residuary devisees and legatees, under the will of Theron D. Francis, for a construction of his will, and an accounting for the personal property of the testator, or the value thereof, from the Estate of Hannah Maria Francis, deceased, the widow of said testator. Theron D. Francis died testate January 31, 1906, in Ogle County, leaving real and personal property; the last will was duly probated. The following provisions were made in the will by the testator concerning the disposition of the

estate:

"I give and bequeath to my sister Mrs. Emily L. Phipps an annuity of One Hundred (\$100.) Dollars to be paid yearly during her natural life.

"I give and bequeath to my cousin Mrs. Sarah L. Willis an annuity of Fifty (\$50.) Dollars to be paid yearly during her natural life.

"I give, bequeath and devise to my beloved wife Hannah Maria Francis and her heirs and assigns one third (1/3) of all my real estate to be selected by her. I further give and bequeath to my said wife Hannah Maria

Francis all of my personal estate and the rents, profits and income from my real estate during her natural life for her own use and purpose -- Subject however to the payment of the annuities herein bequeathed to my sister Mrs. Emily L. Pickford of \$100. and my cousin Mrs. Sarah L. Mills of \$50. during their natural lives -- I further give and bequeath to my wife Hannah Maria Francis, to hold use and take during her natural life all my interest and right in and to our home residence and the contents, appurtenances and equipment thereof, without restraint or charge of any kind what ever, described as follows to-wit: Lots One, Two and Three (1, ~~XXX~~ 2 & 3) in block one (1) in Western Park Addition to the City of Rochelle, County of Ogle and State of Illinois.

5th: After the death of my wife Hannah Maria Francis and the completion and fulfillment of my dequest and devise to my said wife Hannah Maria Francis out of my said estate as stated above in Section 4 -- I give and dequest to my brother Lewis G. Francis and my sister Mrs. Emily L. Pickford jointly and equally, during their natural lives, all the rents, profits and uses of my then remaining Real Estate.

6th: I give, bequeath and devise to the children of my Brother Alfred C. Francis all the remainder of my estate Real and Personal, after the above and fore-going bequests, annuities and devises are completed finished and ended.

7th: I hereby nominate and appoint my beloved wife Hannah Maria Francis to be my sole executrix, to execute this my last Will and Testament and manage and dispose of my estate as hereinbefore set forth."

The testator left no children nor descendants; but ^{the} ~~the~~ widow Hannah Maria Francis survived him; and in accordance ^{with} ~~the~~

Francis all of my personal estate and the rents, profits and income from my real estate during her natural life for her own use and purpose -- Subject however to the payment of the

annuities herein bequeathed to my sister Mrs. Emily L. Pickford of \$100. and my cousin Mrs. Sarah L. Mills of \$50.

during their natural lives -- I further give and bequeath to my wife Hannah Maria Francis, to hold use and take during her natural life all my interest and right in and to our home

real estate and the contents, furnishings and equipment thereof, without restricting or charge of any kind what ever,

described as follows to-wit: Lots One, Two and Three

(1, 2 & 3) in block one (1) in Western Park Addition to the City of Rochelle, County of Ogle and State of Illinois.

After the death of my wife Hannah Maria Francis

and the completion and fulfillment of my bequest and devise

to my said wife Hannah Maria Francis out of my said estate as

related above in Section 4 -- I give and bequeath to my

brother Lewis G. Francis and my sister Mrs. Emily L.

Pickford jointly and equally, during their natural lives,

all the rents, profits and use of my then remaining Real

Estate.

I give, bequeath and devise to the children of

brother Alfred G. Francis all the remainder of my estate

Real and Personal, after the above and foregoing bequests,

and devises are completed finished and ended.

I hereby nominate and appoint my beloved wife

Hannah Maria Francis to be my sole executrix, to execute

this my last Will and Testament and manage and dispose of my

estate as hereinafore set forth.

The testator left no children nor descendants.

the directions, ~~of~~ the will, she was appointed as executrix, and qualified, and acted as such. As executrix, she adjusted all matters pertaining to the estate, and made a final report and settlement November 20, 1906; and was thereupon discharged. Afterwards, on or about April 20, 1916, the widow also died, leaving a last will and testament, which was duly probated; and by the terms of which, she disposed of her entire estate to her nieces and nephews, and a cousin, and certain nieces of her deceased husband, who are parties appellant herein. The appellant A. B. Sheadle was appointed as executor of the will of the widow, and was acting as such, at the time of the filing of this bill. The principal controverted question involved in this litigation is whether under the provisions of the testator's will, the widow took the personal property absolutely or only a life use therein. The court construed the will, finding that the widow took a life interest only; and also found, that the value of the personal property was \$4701.36; and that the personal property ~~taken~~ taken by her was a part of her estate; and that the appellees as residuary legatees were entitled to recover the value from the widow's estate; and that the executor of the estate pay the costs of this proceeding, and a reasonable solicitor's fee from her estate; also pay a guardian ad litem fee, as part of the costs. The appellants prosecuted an appeal from this decree.

It is contended, that the provisions of the will are not in any way doubtful, ambiguous or uncertain; and therefore, that there is no need for construction by a court of equity; but that the widow acquired an absolute title to the personal property by the terms of

the directions of the will, she was appointed as executrix, and qualified, and acted as such. As executrix, she

located all matters pertaining to the estate, and made a

final report and settlement November 30, 1908; and was

discharged. W. Attorneys, on or about April 30, 1910,

the widow also died, leaving a last will and testament, which

was duly probated; and by the terms of which, she disposed

of her entire estate to her niece and nephews, and a cousin,

and certain niece of her deceased husband, who are parties

adversely therein. The appellant A. B. Shadle was appointed

executor of the will of the widow, and was acting as

such, at the time of the filing of this bill. The principal

controversy presented in this litigation is whether

under the provisions of the testator's will, the widow took

the personal property absolutely or only a life use therein.

The court construed the will, finding that the widow took

a life interest only, and also found, that the value of the

personal property was \$4701.36; and that the personal property was

taken by her as a part of her estate; and that the appellees

as residuary legatees were entitled to recover the value from

the widow's estate; and that the executor of the estate pay

the costs of this proceeding, and a reasonable solicitor's

fee from her estate; also pay a guardian ad litem fee, as

part of the costs. The appellants, however, on appeal

from this decree.

It is contended, that the provisions of the will

are not in any way doubtful, ambiguous or uncertain;

and therefore, that there is no need for construction

by a court of equity; but that the widow acquired an

absolute title to the personal property by the terms of

the will; and that she claimed such title in her final report as executrix; and that it was awarded to her by the order of the county court, in approving the final report; and that the appellees are bound by this order; and that it is res adjudicata. The point is also made, that the direction in the decree for the payment of the costs, and solicitor's fees, and guardian ad litem fee out of the estate of the widow is erroneous. The arguments of appellants that the provisions of the will concerning the disposition of the personal property of the testator, are to plain and certain, that there is no room for construction, are almost completely answered, by the situation in which this controversy appears in this court, in which we find ourselves confronted by the briefs of the learned counsel for the respective parties, each arguing with much ability for a widely different construction of the language and provisions of the testator's will; this naturally leads us to conclude, that a proper question for the construction of the will is presented by the bill for the consideration of a court of equity. The rule which has been uniformly applied for construction of a last will in this state is, that the court shall seek for the intention of the testator from the language used; and that the entire will should be considered. *Howe v. Hodge* 152 Ill. 252; *Morrison v. Shorr* 177 Ill. 554; *Morrison v. Tyler* 266 Ill. 308; *Greene v. Old People's Home* 269 Ill. 134; *Defrees v. Brydon* 275 Ill. 530. Construing the will in question according to this rule we think the intention of the testator becomes manifest. We find that

the will, and that she claimed such title in her final report as executrix; and that it was awarded to her by the order of the county court, in approving the final report; and that the appellees are bound by this order; and that it is res adjudicata. The point is also made that the objection to the decree for the payment of the costs, and solicitor's fees, and guardian ad litem fees out of the estate of the widow is erroneous. The arguments of appellees that the provisions of the will concerning the disposition of the personal property of the testator, are to plain and certain, that there is no room for construction, are almost completely answered, by the situation in which this controversy appears in this court, in which we find ourselves confronted by the pretense of the learned counsel for the respective parties, each arguing with equal ability for a widely different construction of the language and provisions of the testator's will; this naturally leads us to conclude, that a proper question for the construction of the will is presented by the bill for the construction of a court of equity. The rule which has been uniformly applied for construction of a will in this state is, that the court shall seek for the intention of the testator from the language used; and that the entire will should be considered. *Howe v. Hodge* 128 Ill. 328; *Morrison v. Short* 7 Ill. 554; *Morrison v. Tyler* 268 Ill. 306; *Greene v. Old People's Home* 268 Ill. 134; *Deitres v. Brydon* 275 Ill. 230. Concerning the will in question according to this rule we think the intention of the testator becomes manifest. We find that

in the first clause of paragraph 4, that the testator designated all the property which the widow was to take absolutely, namely one-third ~~of~~ all of his real estate; then in the clauses following in the paragraph he clearly aimed to group together all the property and effects which were to be held by her for life only; subject to the payment of certain annuities previously provided for. And the effect of this arrangement is emphasized in the 6th paragraph, which is residuary in character; however not residuary, in the sense of merely covering contingencies; but residuary in the sense of distinctly recognizing the fact, that certain bequests, annuities and devises had been made in the will from which a remainder in personal property would result; and it leaves no doubt, but that the testator had in his mind's eye, the life bequests made by him in paragraph 4. Furthermore the inference which is natural from the language used in paragraph 4, as well as the grammatical effect and arrangement of the words, lead to the same conclusion, namely, that it was the intention of the testator to bequeath the property involved to the widow for life only. We are of opinion therefore, that the chancellor properly construed the will; and in holding, that after the widow's death the personal property left by the testator, passed to the children of the brother of the testator, Alfred C. Francis, and that they are entitled to recover the value thereof, from the estate of the deceased widow.

Nor is there any force in the contention of appellant, that the widow having claimed the personal property in her final report as executrix to be hers absolutely,

in the first clause of paragraph 4, that the testator designated all the property which the widow was to take absolutely, namely one-third of all of his real estate; then in the clause following in the paragraph he clearly aimed to group together all the property and effects which were to be held by her for life only; subject to the payment of certain annuities previously provided for. And the effect of this arrangement is emphasized in the 5th paragraph, which is residuary in character; however, not residuary, in the sense of merely covering contingencies; but residuary in the sense of distinctly reserving the last, that certain bequests, annuities and devises had been made in the will from which a remainder in personal property would result; and it leaves no doubt, but that the testator had in his mind's eye, the life bequests made by him in paragraph 4. Furthermore the inference which is natural from the language used in paragraph 4, as well as the grammatical effect and arrangement of the words, lead to the same conclusion, namely, that it was the intention of the testator to bequeath the property involved to the widow for life only. We are of opinion therefore, that the earlier property concerned the will; and in holding, that after the widow's death the personal property left by the testator, passed to the children of the brother of the testator, Alfred L. French, and that they are entitled to recover the value thereof, from the estate of the deceased widow.

Not is there any force in the contention of appealant, that the widow having claimed the personal property in her final report as executor to be hers absolutely,

which report the county court approved, that the question here involved thereby became res adjudicate. The question, whether the personal property was given to the widow ~~taxikak axkxk~~ by the will for life only, was not involved in the matters presented to that court for approval in the final report of the executrix; nor did she make a claim therein of absolute ownership of the property; but merely that the will of the testator gave her all of the personal estate; without saying whether it was given to her absolutely or only for life; and she makes the additional statement in the report that she had taken all the personal estate of said deceased, and appropriated the same to her own use, in accordance with the provisions of the will of her husband. It is therefore evident, that the county court in approving the final settlement of the estate did not pass upon the extent of the widow's title; but merely upon her right to retain possession of the personal property under the provisions of the will; and under these circumstances no estoppel could legally arise concerning the matters involved in this litigation. Complaint is also made because the court ordered the taxing of the costs against the widow's estate, and of the allowance of a solicitor's fee, and a guardian ad litem fee. The abstract does not show any costs which were improperly taxed; nor that any question was raised concerning the erroneous taxing of costs in the court below; nor does it appear for whom the guardian ad litem was appointed. In the absence of any showing to the contrary, we must assume, that the action of the court in that regard was proper, and free from

which report the county court approved, thus the question
of all the property which the widow was to receive
date involved thereby became an adjudge. The ques-
tion, whether the personal property was given to the widow
taxable under the will for life only, was not involved
in the matter presented to that court for approval in the
final report of the executor; nor did she make a claim
of absolute ownership of the property, but merely
that the will of the testator gave her all of the personal
estate; without saying whether it was given to her abso-
lutely or only for life; and she makes the additional
statement in the report that she had taken all the per-
sonal estate of said deceased, and appropriated the same to her
use, in accordance with the provisions of the will
of her husband. It is therefore evident, that the county
court in approving the final settlement of the estate did
not pass upon the extent of the widow's title; but merely
upon her right to retain possession of the personal prop-
erty under the provisions of the will; and under these
circumstances no appeal could legally arise concerning
the matter involved in this litigation. Complaint is
also made because the court ordered the taking of the county
against the widow's estate, and of the allowance of a widow's
fee, and a guardian ad litem fee. The objection does
not show any costs which were improperly taxed; nor that
any question was raised concerning the erroneous taxing of
costs in the court below; nor does it appear for whom the
guardian ad litem was appointed. In the absence of any
showing to the contrary, we must assume, that the action
of the court in that regard was proper, and free from

error. There was error, however, in the allowance of a solicitor's fee for the services of appellee's solicitor, which was directed by the decree to be paid by the executor, out of the estate of the widow. Solicitor's fees in cases where the construction of wills is required in a court of equity can only be allowed and taxed against the estate of the testator whose will is the subject of construction, or out of the funds or property involved. Ingraham v. Ingraham 189 Ill. 432; Arnold v. Allen 173 Ill. 329; Wendall v. Taylor 245 Ill. 617; Deane v. Northern Trust Co. 366 Ill. 205. This proceeding was not brought to obtain a construction of the will of the widow of Theron D. Francis, hence her estate could not be taxed with a solicitor's fee; and the decree should therefore be corrected by eliminating the direction to tax the solicitor's fee against the widow's estate; and in that respect the decree is reversed; but in all other respects it is affirmed.

Reversed in part and affirmed in part and remanded with directions.

error. There was error, however, in the solicitor's fee for the services of the solicitor.

which was directed by the decree to be paid by the estate, out of the estate of the widow.

in case where the construction of wills is required in a court of equity can only be allowed and taxed against the estate of the testator whose will is the subject of construction, or out of the funds or property involved.

In *Arnold v. Arnold*, 189 Ill. 128; *Arnold v. Arnold*, 175 Ill.

100; *Kenall v. Taylor*, 285 Ill. 617; *Dane v. Northern*

Trust Co., 286 Ill. 208. This proceeding was not brought

to obtain a construction of the will of the widow of Thayer

E. Thayer, hence her estate could not be taxed with a

solicitor's fee; and the decree should therefore be

corrected by eliminating the direction to tax the solicitor's

fee against the widow's estate; and in that respect

the decree is reversed; but in all other respects it is

affirmed. It is so ordered. (Solicitor's fee not allowed.)

Reversed in part and affirmed in part and remanded

with directions.

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STATE OF ILLINOIS, { SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

259a

213 I.A. 657

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. ~~JOHN~~ JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 10 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

No. 6584.

F. H. Hooker, Sheriff of)
Knox County, Illinois,)
Appellee,)
vs.)
C. D. Briggs,)
Appellant.)

213 I.A. 657

Appeal from Circuit Court
Knox County.

OPINION by NIEHAUS, J.

This is an action in trover, brought by the appellee F. H. Hooker as sheriff, against the appellant C. D. Briggs, in the circuit court of Knox county, to recover the amount of two judgments upon which execution had been issued to appellee as sheriff, and levied by him upon the property in question. The facts as disclosed by the evidence which are the basis of this controversy are substantially as follows: The appellant owned a farm of 320 acres in Knox County, which was operated by one James Donaldson under a lease during the years 1912, 1913, 1914 and 1915. During the Donaldson tenancy, the appellant was ~~affixed~~ often called upon to sign and pay notes for Donaldson for different amounts, and make advancements of money for obligations which Donaldson had incurred for farm necessities, and farm help, and other things; and Donaldson from time to time in this way became indebted to the appellee, aside from certain sums of money which became due to appellant directly on account of his tenancy. In order to secure appellant for indebtedness incurred in this way Donaldson gave him chattle mortgages on his personal property. In 1913 he gave a

2131.A.657

Appeal from Circuit Court

Knox County.

(F. H. Hooker, Sheriff of
(Knox County, Illinois,
(Appellant,
(vs.
(C. E. Briggs,
(Appellee.)

OPINION BY WILKINS, J.

This is an action in trover, brought by the appellee F. H. Hooker as sheriff, against the appellant C. E. Briggs, in the circuit court of Knox county, to recover the amount of two judgments upon which execution had been issued to the appellee as sheriff, and levied by him upon the property in question. The facts as disclosed by the evidence which are the basis of this controversy are substantially as follows: The appellant owned a farm of 380 acres in Knox County, which was operated by one James Donaldson under a lease during the years 1913, 1914 and 1915. During the Donaldson tenancy, the appellant was extremely often called upon to sign and pay notes for Donaldson for different amounts, and make advancements of money for obligations which Donaldson had incurred for farm necessities, and farm help, and other things; and Donaldson from time to time in this way became indebted to the appellee, aside from certain sums of money which became due to appellant directly on account of his tenancy. In order to secure appellant for indebtedness incurred in this way Donaldson gave him certain mortgages on his personal property. In 1913 he gave a

mortgage for \$1769; on February 8, 1915 another mortgage was given for the sum of \$3000. which included \$1600 remaining due on the previous mortgage given in 1913; and on September 14, 1915, another mortgage was given to cover additional indebtedness, and to include additional property, for the sum of \$3000. The last two mortgages are involved in this suit, and were foreclosed by appellant and the property was taken and sold, after it had been levied upon by the sheriff. These mortgages are attached in this controversy as being fraudulent, and it is claimed by the appellee that there was no substantial consideration for them; and that they were executed for the purpose of hindering and delaying Donaldson's creditors. The vital question in issue is whether the mortgages were in fact fraudulent. There was a trial by jury, and that jury returned a verdict, finding the issues for the appellee, and assessing damages at \$1027.91, which was the amount of the two judgments under which the levy had been made. The court overruled a motion for new trial, and rendered judgment on the verdict; and from this judgment an appeal is taken.

No evidence was adducted impeaching the validity of the mortgage given in February 1915, which was foreclosed at the same time as the mortgage given in September 1915, which embraced a part of the property involved in this litigation and not included in the September ^{mortgage} ~~mortgage~~. It does not clearly appear, which part of the property was included in one mortgage and not the other except that the September mortgage included the corn growing in 1915, and some wheat and oats, and articles of house hold furniture, which were not included in the February mortgage. Both mortgages were

mortgage for \$1000; on February 8, 1915 another mortgage was given for the sum of \$3000, which included \$1800 remaining due on the previous mortgage given in 1913; and on September 14, 1915, another mortgage was given to cover additional indebtedness, and to include additional property, for the sum of \$3000. The last two mortgages are involved in this suit, and were foreclosed by appellant and the property was taken and sold, after it had been levied upon by the sheriff. These mortgages are attached in this controversy as being fraudulent, and it is claimed by the appellee that there was no substantial consideration for them; and that they were executed for the purpose of hindering and delaying the creditors of the appellant. The vital question in issue is whether the mortgages were in fact fraudulent. There was a trial by jury, and that jury returned a verdict finding the issues for the appellee, and assessing damages at \$1007.91, which was the amount of the two judgments under which the levy had been made. The court overruled the appellant's motion for new trial, and rendered judgment on the verdict, and from this judgment an appeal is taken. No evidence was adduced impeaching the validity of the mortgage given in February 1915, which was foreclosed as to the appellant and was not included in this litigation. The mortgage given in September 1915, which was foreclosed as to the appellant and was not included in this litigation, was a part of the property involved in this litigation, and was included in the September mortgage. It is not claimed that the September mortgage was fraudulent, which part of the property was included in the mortgage and not the other except that the September mortgage included the corn growing in 1915, and some other articles of his property. It is claimed that the September mortgage included the corn growing in 1915, and some other articles of his property, and articles of house hold furniture, which were included in the February mortgage. Both mortgages were mortgages on his personal property.

apparently properly executed, acknowledged and recorded, and became liens under the statute; and the appellant had a right to foreclose these liens if the mortgages were not tainted by fraud. Where a mortgage made upon a valuable consideration is attacked as fraudulent, as to the rights of creditors, actual intent to hinder and delay the mortgagor's creditors must be proved to invalidate it.

Hughes v. Noyes 171 Ill. 575; "A creditor has unquestionably the right to pursue his legal remedies against his debtor so long as he does so in good faith, and if he does succeed in obtaining priority either by suit or by the voluntary act of his debtor, he is entitled to hold the advantage gained even though the result may be to postpone or even defeat other creditors." Union National Bank v. State National Bank 188 Ill. 264; Webber v. Mick 131 Ill. 520; Eichstadt v. Moses 105 Ill. App. 636; Goldstein v. Smiley 28 Ill. App. 49; Juillard v. Walker 54 Ill. App. 517; Winkler v. The People 68 Ill. App. 262; McConnell v. Scott 67 Ill. 274; Hessing v. McCloskey 37 Ill. 341. In this case the burden of the proof of fraud was upon the appellee; and the rule concerning presumptions in cases of this kind is, that if motive and design of an act may under the evidence as well be traced to an honest and legitimate source as a corrupt one, the former is to be preferred. McConnell v. Wilcox 2 Ill. 344; Wright v. Grover 27 Ill. 426; Bowden v. Bowden 75 Ill. 143; May v. Gulliman 105 Ill. 272. And it is necessary in a case of this kind also to show that both the mortgagor and mortgages had the design of ~~hindering~~ hindering delaying or defrauding creditors. Brown v. Riley 22 Ill. 45; Meyers v. Kinzie 26 Ill. 38;

apparently properly executed, acknowledged and recorded,
 and these liens under the statute; and the appellant had
 a right to foreclose these liens if the mortgages were
 not tainted by fraud. Where a mortgage made upon a val-
 uable consideration is attacked as fraudulent, as to the
 rights of creditors, actual intent to hinder and delay the
 mortgagee's creditor must be proved to invalidate it.
 Hughes v. Hayes, 171 Ill. 575; "A creditor has undoubted-
 ly the right to pursue his legal remedies against
 his debtor so long as he does so in good faith, and if he
 does succeed in obtaining priority either by suit or by the
 voluntary act of his debtor, he is entitled to hold the
 advantage gained even though the result may be to postpone
 or even defeat other creditors." Union National Bank v. State
 National Bank, 188 Ill. 284; Weber v. Nick, 181 Ill. 520;
 Alabaster v. Moses, 106 Ill. App. 636; Goldstein v. Smiley, 68
 Ill. App. 49; Julliard v. Walker, 54 Ill. App. 517; Wickler
 v. The People, 68 Ill. App. 282; McConnell v. Scott, 27
 Ill. 274; Heeling v. McQuibben, 37 Ill. 341. In this
 case the burden of the proof of fraud was upon the appellee;
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 is, that if motive and design of an act may under the cir-
 cumstances well be traced to an honest and legitimate source
 as a contrary one, the former is to be preferred. McConnell
 v. Wilcox, 5 Ill. 344; Wright v. Wright, 111 Ill. 438;
 Taylor v. Bowden, 75 Ill. 143; May v. Gillman, 106 Ill. 275.
 And it is necessary in a case of this kind also to show
 that both the mortgage and mortgagee had the design of
 hindering, delaying or defrauding creditors.
 Brown v. Riley, 35 Ill. 48; Myers v. Kinzie, 66 Ill. 30;

Gridley v. Bingham 51 Ill. 153.

In this case, while there was much controversy concerning certain items of indebtedness claimed by the appellant; and while there is much room for dispute as to whether Donaldson was obligated to pay the appellant for all of the items claimed, we think the evidence taken altogether clearly tends to show, that there was a substantial indebtedness as the basis for the giving of each of the mortgages here involved; and therefore appellant undoubtedly had the right to make the effort to obtain the security in question for such indebtedness. The property embraced in the mortgages was sold under foreclosure on February 26, 1916 for \$3462.85; on February 28 the appellant rendered to Donaldson an account of the sale, showing the amount realized from the sale; and showing also a balance remaining due after applying the amount realized from the mortgage sale; and this report states the balance remaining due as \$2558.29. Donaldson at that time did not dispute the correctness of this balance; but on the contrary when he subsequently filed his voluntary petition in bankruptcy, scheduled the amount of the balance due, among his unsecured debts; and afterwards testified before the referee, that he owed appellant the amount stated. On the trial of this cause however he testified that he did not think he owed the appellant the amount claimed but that appellant owed him. It is evident from his testimony, that he did not accurately keep track of his obligations; and did not have positive knowledge concerning them, and did not really know how much he owed appellant either at the time of the execution of the chattel mortgages, or at the time of the foreclosure sale; and his testimony

Gilley v. Blalock, 111 Ill. 187.

In this case, while there was much controversy con-

cerning certain items of indebtedness claimed by the ap-

pellant; and while there is much room for dispute as to

whether Donaldson was obligated to pay the appellant for

all of the items claimed, we think the evidence taken

altogether clearly tends to show that there was a substan-

tial indebtedness as the basis for the giving of each of

the mortgages here involved, and therefore appellant

undoubtedly had the right to make the effort to obtain

the security in question for such indebtedness. The

property embraced in the mortgages was sold under fore-

closure on February 28, 1916 for \$3468.88; on February

28 the appellant rendered to Donaldson an account of the

sale, showing the amount realized from the sale; and

showing also a balance remaining due after applying the

amount realized from the mortgage sale; and this report

states the balance remaining due as \$2858.28. Donaldson

at that time did not dispute the correctness of this

balance; but on the contrary when he subsequently filed his

voluntary petition in bankruptcy, scheduled the amount of

the balance due, among his unsecured debts; and otherwise

testified he bore the taxes, that he owed appellant the

amount stated. On the trial of this cause however he

testified that he did not think he owed the appellant the

amount claimed but that appellant owed him. It is evident from

his testimony, that he did not accurately keep track of his obli-

gations; and did not have positive knowledge concerning

them, and did not really know how much he owed appellant

either at the time of the execution of the chattel mortgages,

or at the time of the foreclosure sale; and his testimony

in reference to this matter was very vague. The fact that some of the items of indebtedness were in dispute between the parties, or the fact that appellant claimed more than Donaldson was willing to concede, is not of controlling importance on the question, whether the mortgages had been given with a view to hinder and delay creditors. It is not necessary to the validity of chattel mortgages, that the actual amount of indebtedness should equal the amount for which the mortgages were given. The amount of the consideration stated in a mortgage may be more or less than the sum of the indebtedness secured by it, without effecting its validity. *Kaysing v. Hughes* 64 Ill. 123. And the fact that the consideration of these mortgages was larger than the actual indebtedness proven did not necessarily render them void; but this was a fact subject to explanation and a question for the jury *Woolley V. Frye* 30 Ill. 158.

In view of this legal aspect of the case, we think it was error to modify the appellant's 18th given instruction by inserting therein the word "full," in connection with good and valuable consideration. The evidence did not show, that the mortgages were given for a full consideration but did tend to show, that they were given for a substantial and valuable consideration; and the jury were justified in concluding from the modification made that inasmuch as the appellant had failed to prove the full consideration of \$6000. stated in the mortgage, that a necessary element of proof was lacking to establish his right to the liens claimed; and there was no other instruction given that sufficiently corrected this error.

in reference to this matter was very vague. The fact

that some of the items of indebtedness were in dispute be-

tween the parties, or the fact that appellee claimed more

than Donnell was willing to concede, is not of controlling

importance on the question, whether the mortgages had been

given with a view to hinder and delay creditors. It is not

necessary to the validity of chattel mortgages, that the actual

amount of indebtedness should equal the amount for which the

mortgages were given. The amount of the consideration

stated in a mortgage may be more or less than the sum of the

indebtedness secured by it, without affecting its validity.

And the fact that the con-

sideration of these mortgages was larger than the actual indebted-

ness proven did not necessarily render them void; but this

was a fact subject to explanation and a question for the jury

See 30 Ill. 188.

In view of this legal aspect of the case, we think

it was error to modify the appellant's fifth given instruction-

by inserting therein the word "full," in connection

with good and valuable consideration. The evidence did not

show that the mortgages were given for a full considera-

tion but did tend to show, that they were given for a

substantial and valuable consideration; and the jury

were justified in concluding from the modification made

that inasmuch as the appellant had failed to prove the

full consideration of \$8000, stated in the mortgage, that

a necessary element of proof was lacking to establish

his right to the liens claimed; and there was no other

instruction given that sufficiently corrected this error.

them, and did not modify

either at the

or the time of

The modification must be regarded as reversible error. And we conclude on consideration of the evidence in the record that the issues involved in this controversy should be presented to another jury on the facts; and the judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6542

260a

213 I.A. 658

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 17 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

27-1-1918

AT A TERM OF THE APPELLATE COURT,

and seven.

to him and for the Second District of the State of

THE HON. DUANE J. CARRIES, Presiding Justice.

THE HON. DORRANCE DIBBLE, Justice.

THE HON. JOHN M. NIEHAUS, Justice.

THE HON. HER C. DUFFY, Clerk.

DAVIS, Sheriff.

REMEMBERED, that afterwards, to-wit: on
the 17th day of 1918
the opinion of the Court was filed in
the Clerk's Office of said Court, in the words and figures

to-wit:

Gen. No. 6542

J. H. Anderson, appellant.

vs

Appeal from Warren.

213 I.A. 658

Illinois Rural Credit Association.
appellee

Per Curiam:

Anderson sued the Illinois Rural Credit Association in an action of replevin for three promissory notes signed by plaintiff and payable to defendant, and obtained said instruments upon a writ of replevin. Thereafter defendant limiting its appearance for the purpose of the motion, moved the court to strike the affidavit of replevin from the files; to quash the writ of replevin and the return thereon and to dismiss the suit on five grounds specially stated in said motion. Thereupon plaintiff by leave of court amended said affidavit. Thereafter defendant filed a plea in abatement in which he averred that the person upon whom said writ had been served was not the agent of the defendant. Plaintiff moved to strike said plea from the files. That motion was denied and plaintiff was ruled to reply to said plea instanter. Plaintiff elected to stand by his motion to strike the plea in abatement from the files. And judgment in bar was entered against the plaintiff. He appeals.

By said first motion defendant submitted to the court for decision among other things the question whether the affidavit was sufficient and whether the suit should be dismissed because replevin does not lie in favor of the maker of commercial paper against the payee thereof, that being the third ground alleged for the motion. We are of opinion that by submitting those questions to the determination of the court and moving to dismiss the cause, defendant entered a full appearance and that such effect was not prevented

entered a full appearance and that such effect was not prevented of the court and moving to dismiss the cause, defendant that by submitting those questions to the determination that ground alleged for the motion. We are of opinion commercial paper against the payee thereof, that being the because reprieve does not lie in favor of the maker of affidavit was sufficient and whether the suit should be dismissed for decision among other things the question whether the By said first motion defendant submitted to the court was entered against the plaintiff. He appeals.

strike the plea in abatement from the files. And judgment in also entered. Plaintiff elected to stand by his motion to that motion was denied and plaintiff was ruled to reply to said defendant. Plaintiff moved to strike said plea from the files. upon whom said writ had been served was not the agent of the filed a plea in abatement in which he averred that the person by leave of court amended said affidavit. Thereafter defendant grounds specially stated in said motion. Thereupon plaintiff said and the return thereon and to dismiss the suit on five affidavit of reprieve from the files; to quash the writ of re- for the purpose of the motion, moved the court to strike the a writ of reprieve. Thereafter defendant limiting its appearance and payable to defendant, and obtained said instruments upon action of reprieve for three promissory notes signed by plaintiff Anderson sued the Illinois Rural Credit Association in an

Per Curiam:

station.

Illinois Rural Credit Asso-

vs

L. M. Anderson, appellant.

Gen. No. 658

2181.A. 658

Appeal from within.

by language limiting the appearance to the purposes of that consolidated motion. *Nicholes v People* 165 Ill. 502; *People Cemetary Association*, 266 Ill. 32; *People v Smith*. 381. Ill. 538; *L. & N. R. R. Co. v Illinois Industrial Board*, 282 Ill. 136; 4 Corp. Juris 1316, 1317, 1340.

The judgment is therefore reversed with directions to the court below to strike the plea in abatement from the files.

by limiting the appearance to the purpose of that
connection. Nicholas v People, 111. 502; People
Secretary Association, 288 Ill. 38; People v ... 281. 111. 538;
L. & W. ... v ... Industrial Board, 283 Ill. 138;
Cory, ... 1317, 1340.
The ... is therefore reversed with directions to the
court ... to strike the plea in abatement from the files.
... for three promissory notes signed by plaintiff
... and obtained said instruments upon
... Thenceforth defendant limiting the appearance
... moved the court to strike the
... of ... to quash the writ in
... the return thereon and to ... the writ on five
... stated in said motion. Thereupon plaintiff
... amended said affidavit. Thenceforth defendant
... in which he averred that the person
... was not the agent of the
... Plaintiff moved to strike said plea from the files.
... and plaintiff was tried to reply to said
... Plaintiff objected to stand by his motion to
... he plea in abatement from the files. And judgment in
... against the plaintiff. He appeals.
... all first motion defendant submitted to the court
... the question whether the
... and whether the writ should be
... in favor of the writ or
... that being the
... alleged for the motion. It was
... by submitting those questions to the court
... and moving to dismiss the writ, as

STATE OF ILLINOIS, }
SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

THE UNIVERSITY OF CHICAGO
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6606

261a

213 I.A. 658

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 24 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

SI 31 A 658

AT A TERM OF THE APPELLATE COURT,

at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven,
I, the undersigned, Clerk of the Second District of the State of

CARNES, Clerk Justice.

DORRANCE DIBELL,

Hon. JOHN M. NICHOLS,

CHRISTOPHER C. DUFFY,

E. M. AVIS, Sheriff.

that afterwards, to-wit:
the opinion of the Court was filed in
the office of said Court, in the words and figures
to-wit:

Gen. No. 6806

213 I.A. 658

Uma R. Bersell, appellee

vs

Appeal from Rock Island.

City of Rock Island, appellant.

Per Curiam.

Bersell, owner of real estate in the city of Rock Island, sued the city for damages to his real estate occasioned by the city cutting down a street in front of his property. On a second trial plaintiff had a verdict, and had a judgment thereon for \$1941.00, and the city appeals. It filed a record in this court, in which record was a purported bill of exceptions which was not signed by the judge, and there was upon the record no assignment of errors. Appellant thereupon asked leave to file an additional record, which we granted, and an additional record was filed showing the signature of the judge. We also granted leave to appellant to assign errors upon the record instant, and this was done. Appellee moved to strike the bill of exceptions from the record and to dismiss the appeal and to affirm the judgment. This motion was denied. and the cause was submitted on briefs. Afterwards appellee made another motion to strike the bill of exceptions from the record and to strike the additional record from the files and to dismiss the appeal and affirm the judgment. That motion was taken with the case. Upon a consideration of the case as presented by the original and the additional record it appears that the judgment was entered on March 29, 1918, and that appellant prayed an appeal and was given 90 days to file a bill of exceptions, and that said bill of exceptions was presented to the judge upon the 28th. day of June and on that day and under that date the judge endorsed an entry upon the bill that it should be delivered by counsel for defendant to counsel for plaintiff within fifteen days, and

2131.A.652

Gen. No. 6808

U.S. R. Bessel, appellee

Appeal from Rock Island.

vs

City of Rock Island, appellant.

Per Curiam.

Bessel, owner of real estate in the city of Rock Island, sued the city for damages to his real estate occasioned by the city cutting down a street in front of his property. On a second trial plaintiff had a verdict, and had a judgment thereon for \$1941.00, and the city appeals. It filed a record in this court, in which record was a purported bill of exceptions which was not signed by the judge, and there was upon the record no assignment of errors. Appellant thereupon asked leave to file an additional record, which was granted, and an additional record was filed showing the signature of the judge. We also granted leave to appellant to assign errors upon the record instantly, and this was done. Appellee moved to strike the bill of exceptions from the record and to dismiss the appeal and to affirm the judgment. This motion was denied. And the cause was submitted on briefs. Afterwards appellee made another motion to strike the bill of exceptions from the record and to strike the additional record from the files and to dismiss the appeal and affirm the judgment. That motion was taken with the case. Upon a consideration of the case as presented by the original and the additional record it appears that the judgment was entered on March 22, 1912, and that appellant prayed an appeal and was given 30 days to file a bill of exceptions, and that said bill of exceptions was presented to the judge upon the 28th day of June and on that day and under that date the judge entered an entry upon the bill that it should be delivered by counsel for the defendant to counsel for plaintiff within fifteen days, and

should be returned for signature within thirty days, and that when signed it would be signed and the clerk would be directed to file it as of June 28th. 1918. The bill of exceptions was signed as of that date and was filed as of that date. The time expired June 27, and nothing appears in the record showing its presentation on or before that date, and there was no order of court on or before June 27 extending the time for presentation, and no such order was afterwards entered. Therefore as the record appears the bill of exceptions was presented one day too late and the judge had no power then to receive it or to sign it or to grant any extension. Village of Marseilles v Howland, 136 Ill. 81; Piester v Minkota Mill Co. 222 Ill. 139; Richter v C. & E. R. R. Co. 273 Ill. 625; People v Irwin, 283 Ill. 51 and Madden v City of Chicago 283 Ill. 165.

Appellant resists this motion by filing an affidavit in which he alleges that he presented this bill of exceptions to the Judge on June 4, and that the judge directed him to place it in the hands of the opposite counsel and that he did so and never afterwards had control of the bill. If it had appeared from the record of the court below that this bill of exceptions was presented by appellant to the trial judge on June 4, and then by his direction was placed in the hands of appellees counsel and there remained for signature, undoubtedly under numerous authorities the bill of exceptions would have been properly signed and should have been filed as of June 4 instead of June 28, but there is no such record from the court below, and the situation presented by the record of the court cannot be changed by us nor by any affidavit or proof that may be presented here. People v Capello 282 Ill. 542; People vs Cowen 283 Ill. 308. We must pass upon this record as it appears, and that is that the bill of exceptions was presented one day too late and was therefore signed without authority

should be returned for signature within thirty days, and that when signed it would be signed and the clerk would be directed to file it as of June 28th, 1918. The bill of exceptions was signed as of that date and was filed as of that date. The time expired June 27, and nothing appears in the record showing the presentation on or before that date, and there was no order of court on or before June 27 extending the time for presentation, and no such order was afterwards entered. Therefore as the record appears the bill of exceptions was presented one day too late and the judge had no power then to receive it or to sign it or to grant any extension. Village of Waukegan v Howland, 136 Ill. 81; Priester v Minnesota Mill Co. 233 Ill. 139; Richter v C. & E. R. Co. 273 Ill. 625; People v Irwin, 283 Ill. 51 and Madden v City of Chicago 283 Ill. 155. Applicant resists this motion by filing an affidavit in which he alleges that he presented this bill of exceptions to the judge on June 4, and that the judge directed him to place it in the hands of the opposite counsel and that he did so and never afterwards had control of the bill. If it had appeared from the record of the court below that this bill of exceptions was presented by applicant to the trial judge on June 4, and then by his direction was placed in the hands of appellee's counsel and there remained for signature, undoubtedly under numerous authorities the bill of exceptions would have been properly signed and should have been filed as of June 4 instead of June 28, but there is no such record from the court below, and the situation presented by the record of the court cannot be changed by us nor by any affidavit or proof that may be presented here. People v Gaspie 283 Ill. 543; People v Cowen 283 Ill. 308. We must pass upon this record as it appears, and that is that the bill of exceptions was presented one day too late and was therefore signed without authority

of law. It follows that the bill of exceptions must be stricken from the record. No errors are assigned except those which require for their consideration an examination of the bill of exceptions.

The order of the court will therefore be that the bill of exceptions be stricken from the record and the judgment affirmed.

[illegible]

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

STATE OF ILLINOIS, JEFFERSON COUNTY, ss.

I, GEORGE W. WILSON, Clerk of the said County, do hereby certify that the foregoing is a true and correct copy of the original of record in my office.

In Testimony Whereof, I have hereunto set my hand and the seal of the said County, at Springfield, this 10th day of January, 1880.

6579

262a

2131A. 658

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. ✓ DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

NOV - 8 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE APPELLATE COURT,

and for the Second District of the State of

NE J. CARNES, President Justice.

ORRANCE DIBBLE, Justice

on. JOHN M. NIEHAUS, Justice.

CHRISTOPH C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

REMEMBERED, that at the words, to-wit: on

the opinion of the Court was filed in

1918

office of said Court, in the words and figures

to-wit:

Gen. No. 6579

2131.A. 658

Fred Enderlin, appellee

vs

Appeal from Lake.

Henry Hornbostel et al appellees.

(Emil E. Thiel, et al appellants)

Dibell, P. J.

On June 24, 1905 Johanna Hornbostel and Henry her husband gave a note for \$1,000 to the Security Savings Bank due on or before July 1, 1910 and secured the same by a mortgage of that date to said Bank, conveying ten acres of land near Libertyville in Lake County, upon which the grantors resided. Both husband and wife signed the note as well as the mortgage but it was evidently the separate debt of the wife, for this money was borrowed to build a barn upon said land, which land she owned. On November 10, 1905, the Hornbostels gave a like note for \$200 to the same Bank, secured upon the same land by a second mortgage. The note was payable on or before July 1 1908 and the money was borrowed to complete the barn. Both mortgages were recorded. On the same day that the first note and mortgage were given, Johanna Hornbostel executed her will, the material parts of which were as follows:

"First: I direct that all my just debts and funeral expenses be paid out of my estate.

Second: I give and bequeath to my husband, Henry Hornbostel, all my personal property, whether chattels, money or evidences of money loaned.

Third: I give bequeath and devise to my said husband, Henry Hornbostel, all my real estate of which I may be seized or possessed, to have and to hold for and during his natural life, with the right to have all the use, rents and profits thereof so long as he shall live; and I further give bequeath and de-

2131A.658

Gen. No. 3275

Friedrich, appellee

vs

Henry Hornbostel et al appellees.
(Emil E. Thiel, et al appellants)

Appeal from Lake.

Liberty, P. D.

On June 24, 1905 Johannes Hornbostel and Henry Hornbostel gave a note for \$1,000 to the Security Savings Bank and secured the same by a mortgage of land near Libertyville in Lake County, upon which the grantors resided. Both husband and wife signed the note as well as the mortgage but it was evidently the separate debt of the wife, for this money was borrowed to build a barn upon said land, which land was owned. On November 10, 1905, the Hornbostels gave a like note for \$1,000 to the same bank, secured upon the same land by a second mortgage. The note was payable on or before July 1, 1906 and the money was borrowed to complete the barn. Both mortgages were recorded. On the same day that the first note and mortgage were given, Johannes Hornbostel executed her will, the material parts of which were as follows:

"First: I direct that all my just debts and funeral expenses be paid out of my estate.
Second: I give and bequeath to my husband, Henry Hornbostel, all my personal property, whether chattels, money or evidences of money loaned.
Third: I give bequeath and pay to my said husband, Henry Hornbostel, all my real estate of which I may be seized or possessed, to have and to hold to him and during his natural life, with the right to have all the use, rents and profits thereof so long as he shall live; and I further give bequeath and be-

vide to him the right to have from said real estate, to be raised either by mortgage or sale, five hundred dollars, at any time he may think he may need the same for his comfort, which sum he is hereby fully authorized to raise by mortgage, if he can, and if he cannot raise the same by mortgage, he may sell enough of said real estate to produce the same, which five hundred dollars shall be his, if so raised.

Fourth: Subject to the give and devise to my husband as aforesaid in my said real estate, I give, bequeath and devise the same to my sons, Charles Thiel and Emil Thiel, to be divided equally between them share and share alike, to have and to hold unto them, their heirs and assigns forever."

Mrs. Hornbostel died November 10, 1906. Said will was admitted to probate August 10, 1908. One of her sons Charles Thiel, was named executor in the will, but he never qualified and the estate was never administered. On July 15, 1907, after the death of Johanna but before the will was admitted to probate, Henry Hornbostel and Hannah, his second wife, borrowed \$1300 of Henrietta Homuth and gave a note therefor payable on or before June 15, 1912, and a mortgage upon said real estate to secure the same. Hornbostel was very old and the interest was in arrears and the bank had become uneasy and was urging Hornbostel to pay its two mortgages, and he did apply \$1200 of the sum borrowed from Mrs. Homuth in payment of the principal of the notes due the bank and he secured and filed releases of said mortgages. The other \$100 was for an alleged indebtedness from Mrs. Johanna Hornbostel, deceased to Mrs. Homuth. On October 5, 1909 Hornbostel gave Fred Enderlin a bond for \$2,500 to secure the payment of \$1,800 on or before five years after date and secured said bond by a mortgage of that date from Hornbostel and his second wife to Enderlin. In fact Enderlin loaned to Hornbostel \$1,400 of this money on July 2, 1908, and Mrs. Smith was then paid, and Enderlin paid Horn-

via to him the right to have from said real estate, to be
raised either by mortgage or sale, five hundred dollars, at any
time he may think he may need the same for his comfort, which
sum he is hereby fully authorized to raise by mortgage, if he
can, and if he cannot raise the same by mortgage, he may sell
enough of said real estate to produce the same, which five hun-
dred dollars shall be his, if so raised.

Fourth: Subject to the give and devise to my husband as afore-
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same to my sons, Charles Thiel and Emil Thiel, to be divided
equally between them share and share alike, to have and to hold
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Hannah, his second wife, borrowed \$1200 of Heinrich Homuth
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date from Hornbostel and his second wife to Enderlin. In
last Enderlin loaned to Hornbostel \$1,400 of this money on July
1, 1908, and Mrs. Smith was then paid, and Enderlin paid Horn-

bostel from time to time thereafter the rest of the \$500 required to raise the sum of \$500 mentioned in the third clause of the will. The bond and mortgage evidencing and securing said \$1,800 were not made out at the time that money was furnished by Enderlin and paid to Mrs. ~~Smith~~ Homuth. The business was transacted in the law office of Whitney, Dady and Runyard, at Waukegan, and we think there is enough evidence in the record to justify the conclusion that the Homuth note and mortgage and release were left with that firm till the new papers were executed. The apparent reason for the delay was that the attorneys named were busy and agreed to make out the papers soon, and then neglected it till the following year. The release by Mrs. Homuth though executed July 2, 1908 was never recorded.

This is a bill in equity by Enderlin to foreclose said last named mortgage for the \$1,800 principal and accrued interest. Mr. and Mrs. Hornbostel and the two sons of the first Mrs. Hornbostel, named in the fourth clause of the will, and Lyda Thiel are defendants. Opal Thiel appeared, though not a defendant. The Hornbostels did not answer. The Thiels did answer. The cause was referred to a master, who heard the proofs and reported his conclusions. He reported that \$1,700 of the principal sum secured by the mortgage is a lien upon the fee; that \$100 of the principal and the interest and a certain insurance item is a lien only upon the life estate of Hornbostel. Both sides filed objections to the report, which were overruled and stood as exceptions in the circuit court. There was a decree making \$1,700 of the principal a lien upon the fee and making \$100 of the principal and interest and the insurance items a lien upon the life estate of Hornbostel. The ~~ixxxx~~ decree allowed complainant a solicitor's fee of \$100 to be paid from the sale

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 of the will. The bond and mortgage evidencing and securing said
 \$1,800 was not made out at the time that money was furnished by

Estlin and paid to Mrs. Susan Hornum. The business was

transacted in the law office of Whitney, Day and Runyard, at

Marquette, and we think there is enough evidence in the record

to justify the conclusion that the Hornum note and mortgage and

release were left with that firm till the new papers were exe-

cut. The apparent reason for the delay was that the attorneys

had not yet agreed to make out the papers soon, and

then neglected it till the following year. The release by Mrs.

Hornum is not recorded July 2, 1908 was never recorded.

This is a bill in equity to enforce said

first mortgage for the \$1,800 principal and accrued interest.

It is the bill of Mrs. Hornum and the two sons of the first Mrs.

Hornum, named in the fourth clause of the will, and Lyda Thiel

and the late Mrs. Opal Thiel appeared, though not a defendant.

The Hornums did not answer. The Thiels did answer. The

case was referred to a master, who heard the proofs and reported

his conclusions. He reported that \$1,700 of the principal sum

secured by the mortgage is a lien upon the fee; that \$100 of the

principal and the interest and a certain insurance item is a

lien only upon the life estate of Hornum. Both sides filed

exceptions to the report, which were overruled and stood as

exceptions in the circuit court. There was a decree making

\$1,700 of the principal a lien upon the fee and making \$100

of the principal and interest and the insurance item a lien

upon the life estate of Hornum. The decree allowed

plaintiff a collector's fee of \$100 to be paid from the sale

of the property for the costs of the suit.

1908, and Mrs. Thiel was appointed receiver of the property.

of the fee. The Thiels appeal and Enderlin assigns cross errors. Appellants contend that the provision of the will for raising \$500 for Hornbostel by a mortgage or a sale meant only a mortgage of a sale of his life estate and could not be raised upon the fee and that their interest in the land is not liable therefor; that Hornbostel had no interest which entitled him to pay off the mortgage to the bank, amounting to \$1300 and that if he had any such right and could be subrogated to the rights of the bank in said mortgages, Enderlin is a stranger and can have no right of subrogation and for that additional reason cannot sustain this decree. Appellee contends that the court erred in not making that additional \$100 which paid Mrs. Hornuth's debt from the deceased, and the interest items and the insurance, charges upon the fee.

The general rule is that where a power of disposal accompanies a devise of a life estate in land, the power of disposal is only co-extensive with the life estate and means such a disposal as a tenant for life can make. This rule, however, does not apply if there are other words in the will clearly indicating that a larger power was intended. A testator may create a life estate and give the tenant power to dispose of the fee and limit a remainder after the termination of the life estate. *Barton v Barton*, 383 Ill. 338; *Ward v Caverly*, 276 Ill. 416; *Grunewald v Neu*, 215 Ill. 132; *Kaufman v Breckerinridge*, 117 Ill. 305; and cases there cited. The case presented, therefore, requires a ~~strict~~ construction of the third clause of the will in view of the circumstances surrounding the testatrix when the will was made. The evidence of Hornbostel shows him to be a very old man. Our attention is not called to any evidence of his exact age, but one of the briefs states it at eighty years or more, and that is not questioned by the other side. If this

of the fee. The Thiele appeal and Underlin assigns cross errors.

Appellants contend that the provision of the will for retaining \$500 for Hornbostel by a mortgage or a sale meant only a mortgage of a sale of his life estate and could not be raised upon the fee and that their interest in the land is not liable therefore; that Hornbostel has no interest which entitled him to pay off the mortgage to the bank, amounting to \$1800 and that if he had any such right and could be subrogated to the rights of the bank in all mortgages, Underlin is a stranger and can have no right of subrogation and for that additional reason cannot sustain this decree. Appellees contends that the court acted in not making that additional \$100 which paid Mrs. Hornbostel's debt from the proceeds, and the interest thereon and the insurance, charges upon the fee, executed July 2, 1907.

The general rule is that where a power of disposal accompanies a devise of a life estate in land, the power of disposal is only co-extensive with the life estate and means such a disposal as a tenant for life can make. This rule, however, does not apply if there are other words in the will clearly indicating that a larger power was intended. A testator may create a life estate and give the tenant power to dispose of the fee and limit a remainder after the termination of the life estate. Barton v Barton, 283 Ill. 338; Ward v Gaverly, 278 Ill. 418; Grunewald v Ward, 215 Ill. 133; Kaufman v Breckinridge, 117 Ill. 305; and cases there cited. The cases presented, therefore, requires a narrow construction of the third clause of the will in view of the circumstances surrounding the testatrix when the will was made. The evidence of Hornbostel shows him to be a very old man. Our attention is not called to any evidence of his exact age, but one of the bills states it at eighty years or more, and that is not questioned by the other side. If this

correct he was nearly seventy when this will was made. The court will take judicial knowledge that a life estate in land in a man of that age will sell for very little and that a mortgage of such a life estate would bring practically nothing. The reason is that the duration of such a life is short at best and very uncertain. The testimony tends to show that the value of this land with the buildings upon it was only \$1800 to \$2000 when Mrs. Hornbostel died. The third clause of the will first gives Hornbostel a life estate in this ten acres. Then it says: "I further give and bequeath", etc. and then provides for raising the \$500 by mortgage or sale. The use of the word "further" implies that something is to be added to the life estate already given. The giving of the life estate included the right to sell or mortgage said life estate, so that if the testatrix only meant to authorize him to raise \$500 by mortgage or sale of the life estate, that language added nothing to what was previously given to Hornbostel, and the latter part of the third clause was a repetition and unnecessary. In view of the fact that the latter part of the third clause, so understood, adds nothing to the will, and that \$500 obviously could not be raised by a mortgage or sale of the life estate, we conclude the reasonable construction to be that the testatrix meant that he might mortgage or sell the fee to produce said \$500. But something further follows from that. On the very day she made this will, she placed a mortgage for \$1,000 on the fee and afterwards added another mortgage for \$200. We think it obvious from the proof on this subject that it would not have been practicable to raise \$500 more by a third mortgage on the fee, and that the most feasible way to raise that \$500 from the fee without a sale, and the way most advantageous to the Thiels, would be to raise enough by a third mortgage to pay said first and second mortgages and the \$500. This was what was actually done, although not

corrected he was nearly seventy when this will was made. The court will take judicial knowledge that a life estate in land in a man of that age will sell for very little and that a mortgage of such a life estate would bring practically nothing. The reason is that the duration of such a life is short at best and very uncertain. The testimony tends to show that the value of the land with the building upon it was only \$1800 to \$2000 when Mrs. Harbord died. The third clause of the will first gives Harbord a life estate in this ten acres. Then it says: "I further give and bequeath", etc. and then provides for raising the \$500 by mortgage or sale. The use of the word "further" implies that something is to be added to the life estate already given. The giving of the life estate included the right to sell or mortgage said life estate, so that in the testatrix only meant to authorize him to raise \$500 by mortgage or sale of the life estate, that language added nothing to what was previously given to Harbord, and the latter part of the third clause was a repetition and unnecessary. In view of the fact that the latter part of the third clause, as understood, adds nothing to the will, and that \$500 obviously could not be raised by a mortgage or sale of the life estate, we conclude the reasonable construction to be that the testatrix meant that he might mortgage or sell the fee to produce said \$500. But something further follows from that. On the very day she made this will, she placed a mortgage for \$1500 on the fee and afterwards added another mortgage for \$500. We think it obvious from the proof on this subject that it would not have been practicable to raise \$500 merely by a third mortgage on the fee, and that the most feasible way to raise that \$500 from the fee without a sale, and the way most advantageous to the Thels, would be to raise the \$500 by a third mortgage to pay said first and second mortgages and the \$500. This was what was actually done, although not

immediately. The third, or Homuth, mortgage was given because the bank was pressing for its pay, and it was given for the \$1,300 and for \$100 additional said to be due from the deceased to the third mortgagees, Mrs. Homuth. The Fourth Mortgage, the one here being foreclosed, was given to pay off the Homuth mortgage and to raise the \$500. As the testatrix gave Hornbostel the right to raise \$500 by sale or mortgage of the fee, upon which she had previously placed these other mortgages, we are of opinion that the power was impliedly given to Hornbostel to do whatever was reasonably necessary to enable him to raise that \$500 and under the circumstances that included the right to raise by mortgage or sale enough to remove the prior incumbrances as well as to raise the \$500. This gave him power to borrow this money of Enderlin and to give the mortgage. Enderlin loaned the money to one who had power to sell or mortgage the fee to raise it. and his mortgage is valid as to the \$1300 and the \$500 without resort to the principles of subrogation. The Enderlin mortgage by mistake described the obligation secured thereby as payable on three years, whereas it was payable in five years, but that mistake was set out in an amendment to the bill, and was corrected by the decree.

The testatrix at her death left an insurance policy on her life in favor of her two sons by a former husband, two of the appellants herein. They assigned that policy to Hornbostel and he collected \$700 thereof. Appellants appear to claim that the recovery against them on this mortgage should have been reduced by that amount. In their answer they set up the transfer of this policy to their stepfather and his receipt of \$700 thereon. They did not allege that this was to apply on the mortgages given by their mother or on the \$500 he was authorized to raise on this land, or that they assigned this policy to Hornbostel by virtue of any contract or ~~agreement~~ arrangement between them.

immediately. The third, or Hornum, mortgage was given because the bank was pressing for its pay, and it was given for the \$1,200 and for \$100 additional said to be due from the deceased to the third mortgage, Mrs. Hornum. The fourth mortgage, the one here being discussed, was given to pay off the Hornum mortgage and to retain the \$500. As the testatrix gave Hornboast the right to raise \$500 by sale or mortgage of the fee, upon which she had previously placed these other mortgages, we are of opinion that the power was impliedly given to Hornboast to do whatever was reasonably necessary to enable him to raise that \$500 and under the circumstances that included the right to raise by mortgage or sale enough to remove the prior incumbrances as well as to raise the \$500. This gave him power to borrow this money to enable him to give the mortgage. Enfield loaned the money to him and power to sell or mortgage the fee to raise it. And his mortgage is valid as to the \$1,200 and the \$500 without resort to the principle of subrogation. The Enfield mortgage by mistake described the obligation secured thereby as payable in three years, whereas it was payable in five years, but that mistake was set out in an amendment to the bill, and was corrected by the decree.

The testatrix at her death left an insurance policy on her life in favor of her two sons by a former husband, two of the appellants herein. They assigned that policy to Hornboast, and he collected \$700 thereon. Appellants assert to claim that the recovery against them on this mortgage should have been reduced by that amount. In their answer they set up the transfer of this policy to their stepfather and his receipt of \$700 thereon. They did not allege that this was to apply on the mortgage given by their mother or on the \$500 he was authorized to raise on this land, or that they assigned this policy to Hornboast by virtue of any contract or agreement between them.

Their statement of this in their answer made it a mere gift. Consequently we are unable to see that they are entitled to any credit herein therefor upon the amount of the decree.

We are of opinion that the life tenant is required to pay taxes interest on incumbrances, ordinary repairs and insurance. *Huston v Tribetts* 171 Ill. 547; *Lehman v Rothbarth*, 111 Ill. 185 *Sprague v Beamer*, 45 Ill. App. 17; 17 R.C. L. 636, 639, 641, 642. We are therefore of opinion that the court properly held that the interest and the insurance items were liens only upon the life estate. The alleged debt of \$100 from the testatrix, to Mrs. Emma Homuth would not be charged by Hornbostel on the fee in the real estate. No administration was had and the claim was never legally presented or established as a charge on her estate.

The court allowed a solicitor's fee of \$100 to be paid from the sale of the fee. The first mortgage given by the testatrix allowed a solicitors fee of \$50. Her second mortgage provided for a reasonable solicitors fee. If these mortgages had been foreclosed and Hornbostel had been compelled to pay a solicitors fee to remove these incumbrances, he could have included them in a third mortgage given by him for that purpose. But he did not pay any solicitors fee under the first two mortgages. We find no proofs which would authorize him to charge subsequent solicitors fees upon the fee. We therefore conclude that all the decrees should be affirmed except the allowance of \$100 as solicitors fees for complainant, to be taxed as costs, and paid from the sale of the fee. If complainant had specially claimed interest upon the \$500 included in the last mortgage in raising that sum as named in the third clause of the will, a different question would be presented. Not only did complainant not make a claim for interest on the \$500 but he also did not lay a basis for computing that interest. He testified

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and paid from the sale of the fee. If complainant had speedily
claimed interest upon the \$500 included in the last mortgage
it is likely that sum as named in the third clause of the will,
a different question would be presented. Not only is complainant
not to make a claim for interest on the \$500 but he also did
not lay a basis for computing that interest. He testified

that this \$500 was paid by him to Hornbostel at different times and he did not lay the basis for computing interest thereon.

Appellants seem to contend that Hornbostel should have applied the personal property, namely, household furniture, farming implements and live stock on the farm, to the payment of the two mortgages for \$1000 and \$200 and that the court erred in not so applying the value of that personal property. There seems to us several answers to this contention. Enderlin could not equitably be subjected to any such marshalling of assets between Hornbostel and Charles and Emil Thiel. He did not ask any such relief in his bill of complaint. If the Thiels were entitled to any such relief against Hornbostel, they could only have obtained it by a cross bill, which they did not file. If such relief were obtainable by the Thiels, they should have proved what personal property their mother owned and its value at her death. The master found and the court in its decree found that said personal property was worth, "to-wit, \$1,000." There was no evidence to justify any such finding. One of the Thiels fixed a value on the household furniture of \$500. He gave no basis for any such estimate. He did not tell whether the furniture was new or old, nor give any detailed description of what it consisted and it is evident that that valuation was a mere guess. He fixed no value on the other personal property and gave no account of it from which anyone else could make an estimate. Again, while one of the Thiels testified that the personal property on the farm all or nearly all of it belonged to his mother, he gave no reason for knowing that fact. On the other hand, Hornbostel testified that he and his wife Johanna, were joint owners of all the personal property. Moreover, to authorize the Thiels to have any allowance for the value of the interest of Johanna Hornbostel in the personal property, it should have

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been shown what other debts she owed, and to what extent they were preferred debts, entitled to payment before these two mortgage debts.

Appellants contend that the master erred in rulings upon the admission of evidence. It would perhaps have been wise if the master had admitted this evidence, subject to objection, so that if any of it proved to be competent, it could be considered, but when the actual issues raised by the pleadings are considered and it is also considered that the questions to which objections were sustained did not indicate that the answers could be competent or material and that no offer of proof was made and that the only claim of appellants is that, perhaps, if the questions had been answered, it might have led to something material, we conclude there was no reversible error in said rulings.

This record discloses several other reasons why the decree cannot be reversed as to the merits. The prayer for appeal was joint only and not joint and several and it was prayed by and granted to "the defendants". Hornbostel and wife were defendants.

They did not sign the appeal bond nor assign errors here. If the word "defendants" be strictly construed then this appeal must fail, because not joined in by all to whom the appeal was granted.

If the order be construed to be limited to the defendants who appeared by solicitors, then the appeal was by Emil E. Thiel Lyda Thiel, Charles Thiel and Opal Thiel, jointly and not jointly and severally. They all signed the appeal bond and assign errors here. Lyda Thiel was a defendant in the bill and answered.

We are unable to find in this record anything in the pleadings or proofs or decree that shows that she has any interest whatever in the subject matter of this litigation. In 3 Corpus Juris 1352 the general rule is thus stated: "A joint assignment of error must be good as to all who join therein, or it will not be

been shown what other debts she owed, and to what extent they were preferred debts, entitled to payment before these two mortgage debts.

Appellants contend that the master erred in ruling upon the admission of evidence. It would perhaps have been wise if the master had admitted this evidence, and, in objection, so that if any of it proved to be competent, it could be considered, but when the actual issues raised by the pleadings are considered and it is also considered that the questions to which objections were sustained did not indicate that the answers could be competent or material and that no offer of proof was made and that the only claim of appellants is that, perhaps, if the questions had been answered, it might have led to something material, we conclude there was no reversible error in said ruling.

This record discloses several other reasons why the decree cannot be reversed as to the writs. The prayer for appeal was joint only and not joint and several and it was prayed by and granted to "the defendants". Hornbostel and wife were defendants. They did not sign the appeal bond nor assign errors here. If the word "defendants" be strictly construed then this appeal must fail.

It was not joined in by all to whom the appeal was granted. If the appeal be construed to be limited to the defendants who appeared by solicitors, then the appeal was by Emil E. Thiel, Lydia Thiel, Charles Thiel and Gust Thiel, jointly and not jointly and severally. They all signed the appeal bond and assign errors here. Lydia Thiel was a defendant in the bill and answered. They are unable to find in this record anything in the pleadings or facts on which they show that she has any interest whatever in the subject matter of this litigation. In 3 Corps Juris 1882 the general rule is thus stated: "A joint assignment of error must be good as to all who join therein, or it will not be

available as to any of them, and if it is not good as to one, it will be overruled or disregarded as to all." Many authorities are there cited. In *Moore v Capps*, 4 Gilm. 315, on p. 318, this rule was recognized in the following words: "There was no necessity for all the defendants below to join in the writ of error. As it is they have all joined in a writ of error which but a part can maintain. The joint writ must therefore be dismissed". To the like effect is *Brachtendorf v Kehm*, 73 Ill. App. 288, where it is said: "An assignment of errors, like a pleading, must set forth errors which are available to all who join in it. If not good as to all it is not good as to any." *Monsen v Meyer*, 93 Ill. App. 94 is to the same effect. Therefore, as Lyda Thiel is not shown by this record to have any interest whatever in the subject matter of this litigation, the assignment of errors is not good as to her and therefore is not good as to any of the plaintiffs in error. Opal Thiel was never named as a defendant in the bill of complaint but she appeared and answered and is named in the decree. Nowhere in the pleadings or decree is there anything to indicate that she has any interest in the subject matter of the suit. The proof showed incidentally, that she is the wife of Charles Thiel. She has no inchoate right of dower, for Charles Thiel had only a vested remainder, expectant upon the life estate of Henry Hornbostel, and a widow is not allowable in such case. *Strawn v Strawn*, 50 Ill. 33, 38. *Kellest v Shepard* 139 Ill. 433, 449. *Kirkpatrick v Kirkpatrick*, 197 Ill. 144, 153. 14 Cyc. 892. As Opal Thiel has no interest in the subject matter of the litigation, disclosed either in the pleadings, the proofs or the decree, she cannot appeal or assign error, and the errors assigned are not well assigned as to her and therefore are not well assigned as to any of the plaintiffs in error.

The decree is reversed as to the provision that the solicitor's compensation shall be paid out of the proceeds of the sale of the fee. In all other respects the decree is affirmed.

available as to any of them, and it is not good as to one, it will be overruled or disregarded as to all." Many authorities are cited. In *Moore v Gappa*, 4 Gilm. 315, on p. 318, this rule is recognized in the following words: "There was no necessity for all the defendants below to join in the writ of error. As it is they have all joined in a writ of error which put a part on all. The joint writ must therefore be dismissed." To the like effect is *Brachtenburg v Kahn*, 73 Ill. App. 388. There it is said: "An assignment of errors, like a pleading, must set forth errors which are available to all who join in it. It not available to all it is not good as to any." *Monsen v Meyer*, 83 Ill. App. 94 is to the same effect. Therefore, as Lydia Thiel is not shown by this record to have any interest whatever in the subject matter of this litigation, the assignment of errors is not good as to her and therefore is not good as to any of the plaintiffs in error. Opal Thiel was never named as a defendant in the bill of complaint but she appeared and answered and is named in the decree. Nowhere in the pleadings or issues is there anything to indicate that she has any interest in the subject matter of the suit. The proof showed incidentally, that she is the wife of Charles Thiel. She has no inheritance right of her own. Charles Thiel had only a vested remainder, expectant upon the life estate of Henry Hornbostel, and a widow is not heritable in such cases. *Strawn v Strawn*, 50 Ill. 35, 38. *Kellert v Bepko*, 130 Ill. 483, 489. *Kirpatrick v Kirpatrick*, 107 Ill. 144, 153. 14 Cyc. 894. As Opal Thiel has no interest in the subject matter of the litigation, disclosed either in the pleadings, the proofs or the decree, she cannot appeal or assign error, and the errors assigned are not well assigned as to her and therefore are not well assigned as to any of the plaintiffs in error. The decree is reversed as to the provision that the solicitor's compensation shall be paid out of the proceeds of the sale of the fee. In all other respects the decree is affirmed.

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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213 I.A. 658

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs.

HAZEL SMITH,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

The defendant, Hazel Smith, was found guilty in the Municipal court of Chicago of a violation of Sec. 270, Chap. 38 of the Revised Statutes of Illinois.

An information charging her with the offense of which she was convicted was filed April 6, 1918; subsequently a motion was made to quash the information and to discharge the defendant, which motion was overruled. April 10, 1918, the defendant entered a plea of not guilty to the information. A jury was impaneled and April 11, 1918, it returned a verdict finding defendant guilty as charged in the information, upon which verdict the court sentenced her to confinement in the House of Correction for a term of 60 days. The defendant seeks by this appeal to reverse this judgment.

The information upon which the case was tried charged that on the 4th day of April, 1918, the defendant

"was an idle and dissolute person and was habitually neglectful of her employment and calling and did not provide for herself and neglected all lawful business and did habitually mis-spend her time without giving a good account of herself * * * that the said Hazel Smith is a common night walker, lewd, wanton and lascivious person in behavior, and is habitually found prowling in and loitering around the thoroughfares and tippling shops, in violation of Section 270, Chapter 38 of the Revised Statutes of Illinois."

It is insisted that defendant was arrested without a warrant and that hence the court was without jurisdiction to

2131A 028

THE PEOPLE OF THE STATE OF ILLINOIS

Defendant in Error

VERDICT TO BE RETURNED

OR OTHERWISE

IN FAVOR OF THE PEOPLE

The defendant, ROBERT J. BROWN, was found guilty in

the criminal court of Chicago of a violation of sec. 270,

Chapter 38 of the Revised Statutes of Illinois.

An indictment charging him with the offense of

which was returned was filed April 6, 1937, substantially as

follows: That the defendant, ROBERT J. BROWN, did unlawfully

intentionally, which section was amended April 13, 1936, the

defendant, ROBERT J. BROWN, did unlawfully, to the information, a

violation of section 270, Chapter 38 of the Revised Statutes of Illinois.

That the defendant, ROBERT J. BROWN, is returned a verdict

of guilty of the offense charged in the indictment, upon

which verdict the court pronounced him to be confined in the

penitentiary for a term of 60 days. The defendant seeks

to this court to reverse said judgment.

The information upon which the case was tried

charged that on the 24th day of April, 1936, the defendant

did unlawfully and intentionally, which section was amended April 13, 1936, the

defendant, ROBERT J. BROWN, did unlawfully, to the information, a

violation of section 270, Chapter 38 of the Revised Statutes of Illinois.

That the defendant, ROBERT J. BROWN, is returned a verdict

of guilty of the offense charged in the indictment, upon

which verdict the court pronounced him to be confined in the

penitentiary for a term of 60 days. The defendant seeks

try the case. There is no merit in this contention. The defendant was tried upon an information duly filed and she went to trial without objection, on a plea of not guilty to the charge made in the information. The abstract of record does not, as a matter of fact, disclose whether the defendant was or was not arrested without a warrant. On the filing of the information a capias was issued April 6, 1918, and on the same day the defendant entered into a recognizance with sureties for her appearance for trial, which took place on the 11th day of April, 1918.

The court did not err in admitting testimony of several witnesses as to the acts, conduct and several arrests of defendant for violating the "vagrancy" law. The cases and authorities relied upon by defendant are not in point. It may be conceded that a prosecutor is not permitted to prove in a criminal prosecution offenses distinct and separate from that charged against a defendant, (Parkinson v. People, 135 Ill. 104) but the cases which uphold this principle are not applicable here. The charge in the information filed against the defendant is in substance that she had followed an occupation and a continuing course of conduct which constituted a violation of the law. The evidence which was introduced in support of the charge amply shows that defendant at the time of her arrest was and for years prior thereto had been guilty of violation of the law. The testimony of several police officers is to the effect that she was a common prostitute and had for several months preceding her arrest solicited patronage on the public streets of the city of Chicago. There is no merit at all in her contention that the evidence was insufficient to warrant the verdict of the jury.

Our attention is called to several cases decided by this court in which convictions have been reversed for lack of sufficient proof. Those cases are not at all similar to the one

...the case. There is no need to find a violation. The case
...was filed upon an information filed and the case
...to find a violation, on a basis of not finding to the
...made in the information. The absence of record does not
...of fact, disclosure whether the defendant was or was not
...against a violation. On the filing of the information a
...was issued April 6, 1938, and on the same day the defendant
...into a photograph with a view of her appearance for
...place on the 15th day of April, 1938.
The court did not act in violating testimony of her
...as to the facts, relevant and material aspects of the
...for violating the "statute" law. The case and the cri-
...upon by defendant was not in point. It may be conceded
...is not permitted to prove in a criminal case
...and separate facts that charged against a
...the case. (Lockman v. People, 138 Ill. 104) but the case
...this principle are not applicable here. The court
...the defendant is in violation
...had followed an occupation and a continuing course of
...a violation of the law. The witness which
...in support of the charge which shows that defendant
...at the time of her arrest was and for years prior thereto had been
...of violation of the law. The testimony of several police
...to the effect that she was a common prostitute and had
...months preceding her arrest solicited patronage on
...of the city of Chicago. There is no need of
...the evidence was insufficient to establish
...of the jury.

Our attention is called to several cases decided by
this court in which convictions have been reversed for lack of
...proof. These cases are not at all similar to the one

at bar. (People v. Warren, 158 Ill. App. 341; People v. Hill,
234 Ill. App. 632; City of Chicago v. Steady, 192 Ill. App. 514.)

The judgment of the Municipal court is affirmed.

AFFIRMED.

THESE ARE THE ONLY TWO CASES IN WHICH THE
 1,400,000 IN THE YEAR 1900, AND THE 1,400,000
 IN THE YEAR 1910, AND THE 1,400,000 IN THE YEAR 1920
 IN THE YEAR 1930, AND THE 1,400,000 IN THE YEAR 1940
 IN THE YEAR 1950, AND THE 1,400,000 IN THE YEAR 1960
 IN THE YEAR 1970, AND THE 1,400,000 IN THE YEAR 1980
 IN THE YEAR 1990, AND THE 1,400,000 IN THE YEAR 2000
 IN THE YEAR 2010, AND THE 1,400,000 IN THE YEAR 2020
 IN THE YEAR 2030, AND THE 1,400,000 IN THE YEAR 2040
 IN THE YEAR 2050, AND THE 1,400,000 IN THE YEAR 2060
 IN THE YEAR 2070, AND THE 1,400,000 IN THE YEAR 2080
 IN THE YEAR 2090, AND THE 1,400,000 IN THE YEAR 2100

145 - 24452

JAMES S. JACKSON,
Appellee,

vs.

EDWARD C. KOHLER and
HENRY A. KOHLER,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

213 I.A. 659

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal court of Chicago in the sum of \$2,000 and defendants bring the case here by appeal for review.

The plaintiff, a real estate broker, procured the defendants, Edward C. Kohler and Henry A. Kohler, to enter into a written agreement with one Frederick A. Hastings for the exchange of certain real property; part of this written contract is as follows:

"Brokerage fees to be paid as follows, to-wit:

Party of the first part to pay to Jackson Brothers Two Thousand Dollars; party of the second part to pay to Jackson Brothers, as agreed dollars."

"This contract made with the understanding that the consent of Henry Gerstley and the Billings, lessors, are to be obtained to the transfer of their leases."

"All deeds to be passed and this negotiation to be closed within thirty days from the date of this agreement. Time is hereby declared to be of the essence of this agreement."

Plaintiff was not a party to this contract.

It was disclosed on the trial that Henry Gerstley and others leased certain real estate located at Washington and Green streets in Chicago to defendants for a term of 99 years. This lease provided, among other things, for the erection of a building on said premises and it contained elaborate covenants on the part of lessees. Following the execution of this lease the defendants erected a building upon the leased lot, and in so doing

found it advisable to lease from the trustees of the Billings estate an adjoining strip of land so as to permit the footing of the foundation wall of the building to extend into this adjoining lot. The trustees being without power to grant this privilege for a longer period than 30 years, a lease for that period of time was executed which provided that the lease could not be assigned by the lessees without the written consent of the lessors. The evidence introduced upon the trial tends to show that the plaintiff during the year 1916 attempted to negotiate a sale of the defendants' interest in the property in question to one Frank A. Hecht, and that in the course of conferences with defendants he became informed of the character of defendants' legal interest in the property and of the restrictions and limitations in the lease last referred to. The 99 year Gerstley lease contained a provision that the floor strength of the building to be erected by defendants should be sufficient to support a live load of 150 pounds for each square foot of floor space, and that the building was to be erected in compliance with the ordinances of the City of Chicago. When erected the building had "a rated floor strength of 250 pounds to the square foot."

Evidence was introduced tending to show that certain building notices issued by the Building Department of the City of Chicago were posted in the building during the time that plaintiff was negotiating with defendants, which notices prohibited "the loading of floors of said building beyond 100 pounds to the square foot." Plaintiff denied ever having seen these notices.

In the earlier contract executed by defendants for the sale of the premises to one Frank A. Hecht it was provided that "in case of no exchange of said property for any reason, the said Kohlers should not be indebted to said Jackson Brothers in any amount." The contract upon which this suit is based did not

[illegible]

contain any provision similar to the one above quoted. Hecht refused to consummate this deal for the reasons which the evidence indicates were known to plaintiff. The Hastings contract contained a provision that the contract was made with the understanding that the Billings trustees' and Gerstley's consents were to be obtained to the transfer of defendants' interest in the premises, and was inserted in the contract at the suggestion of one of the defendants. But, even without this provision, it is obvious that these consents were necessary to a final consummation of the deal. The real controversy between the parties hereto is as to whether it was the duty of plaintiff to procure these consents. The evidence shows that in every other respect the plaintiff performed all that his contract or the law required of him to procure a person who was willing, able and ready to purchase the property on the terms submitted by defendants.

One of the defendants testified that he requested plaintiff to place in the contract an alleged oral understanding that plaintiff was to procure the consents of the lessors and that plaintiff refused to do so, for certain reasons, one of which was that his stenographer was not at hand to make the insertions at the time this alleged promise was made by plaintiff. This conversation is denied by the plaintiff and his testimony is corroborated by that of his stenographer.

The contract did not expressly impose the duty of procuring the consents of the lessors upon either the defendants or Hastings, and it does not appear from the language used that the contract was to be regarded as unenforceable by a failure to procure these consents. Whether the plaintiff had by separate agreement agreed to perform this service for the defendants was a question of fact for the jury. The evidence as to this matter was contradictory and was of such character that we are not warranted

...and provision ... to the ...
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in interfering with the conclusions reached by the jury and the trial Judge. Apart from the effect to be given to this alleged agreement, plaintiff could not be deprived of his right to commissions because of defects in defendants' title. The evidence does not disclose that the plaintiff prevented the consummation of the deal. If it did, he would not of course be entitled to his commissions; (Woolf v. Sullivan, 224 Ill. 509) nor did plaintiff assist defendants in making a contract which he knew the defendants could not perform because of defects in their title. Quinlan et al. v. Towle, 185 Ill. App. 593.

We are unable to say from the record before us that the defendants could not have closed the deal with Hastings if they saw fit to do so. From an examination of the evidence we are led to believe that plaintiff attempted to deal fairly with both parties to the contract. Hastings stood ready at all times to perform his part of the contract. The testimony of the plaintiff tends to show that the wife of one of the defendants refused to sign a deed to the property and that this defendant went to Hastings and informed him that if he, Hastings, knew the facts about this deal he would not want it. Plaintiff also testified that he knew nothing about the requirements of the Gerstley lease with reference to the floor strength of the building or that it encroached upon the Billings estate lot, and hence did not conceal the knowledge of these facts from Hastings.

There was some evidence submitted to the jury which tended to show that defendants refused to complete the transfer of the property for reasons other than those connected with the failure to procure the consents of the lessors. After the execution of the contract plaintiff talked with Gerstley, who informed him that he would submit the question of his consent to his attorney, and the evidence fails to disclose that Gerstley at any time there-

[illegible]

after refused to give his consent to the transfer. No effort seems to have been made by the defendants to procure the consent of the trustees of the Billings estate.

The jury were warranted in believing that the failure to consummate the deal was due to the default of defendants and that plaintiff had throughout the negotiations acted in good faith and with reasonable skill and energy.

Fox v. Ryan, 240 Ill. 391; Monroe v. Snow, 131 Ill. 126.

The case of Lawrence v. Rhodes, 188 Ill. 100, relied upon by defendants, is not decisive of plaintiff's right to the commissions which were earned by him. The contract of sale involved in that case was optional in that the prospective purchaser had the option to purchase the property at a fixed price or submit to a forfeiture of a definite sum of money. The broker in that case did not procure the execution of a valid, binding and enforceable contract for the sale of the premises. The contract here seems to be binding and enforceable.

Other questions are presented by briefs of counsel with respect to which we think no reversible error was committed by the trial court.

The judgment of the Municipal court is affirmed.

AFFIRMED.

after refusal to give his consent to the transfer. No effort was made to have been made by the defendant to procure the consent of the trustees of the Billings estate.

The jury were warranted in believing that the failure to transfer the home was due to the refusal of the trustees and that plaintiff had throughout the negotiations acted in good faith and with reasonable skill and energy.

See v. Ryan, 240 Ill. 501; Wentz v. Shaw, 131 Ill. 128. The case of Wentz v. Shaw, 131 Ill. 128.

Value given by defendant, is not decisive of plaintiff's right to the homestead which was owned by him. The homestead at issue involved in that case was appraised in that the prospective purchaser had the option to purchase the property at a fixed price or submit to a foreclosure of a definite sum of money. The option in that case did not procure the exercise of a valid, binding and enforceable contract for the sale of the property. The contract here seems to be binding and enforceable.

Other questions are presented by order of counsel with respect to which we think no reversible error was committed by the trial court.

The judgment of the municipal court is affirmed.

APPROVED,

170 - 24517

J. A. ELLIOTT,
Appellant,

vs.

G. H. ADAMICK et al.,
Appellees.

213 I.A. 659

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

J. A. Elliott filed a bill in the Circuit court of Cook County against G. H. Adamick and others for the purpose of securing the delivery to complainant, or to permit him to inspect the contents, of a safety deposit box in the vault of the Fort Dearborn Safety Deposit Company, which was also made a defendant in the case.

It is alleged in the bill that Elliott and Adamick had entered into a written contract with William Bannerman under which Elliott and Adamick agreed to pay into the treasury of William Bannerman & Co., a corporation, the sum of \$5,000, of which total sum each was required to pay the sum of \$2,500. In return for this amount Bannerman agreed to deliver in writing to Elliott and Adamick a formula and method of preparing and compounding a preparation manufactured by William Bannerman & Co., and known as "Bannerman's Intravenous Solution." By the agreement this written formula was deposited in the joint names of Elliott and Bannerman in a safety deposit box under an agreement that no one of the parties was to have access thereto except in the presence of the other two, "unless one of the parties should die, in which event the two remaining parties should have access to said safety deposit box whenever the full amount of \$5,000 had been paid." The contract also provided that in the event

either Elliott or Adamick should fail to make the payments required under it, then the contract was to become null and void and any money paid thereunder was to be forfeited to the corporation as liquidated damages.

It was further alleged in the bill that the contract in question provided that if either Elliott or Adamick should default in making payments as required, either of them would have the right to make payments in lieu of the one so defaulting, and that whenever the full sum of five thousand dollars had been paid the person so making such payments was to be entitled to the formula.

It is further alleged in the bill that Adamick made payments under the contract aggregating \$850.00, the last of which was made on February 23, 1915; that thereafter Adamick refused, without legal excuse, to make any further payments under the contract; that complainant Elliott paid the \$2,500.00 which he had agreed to pay under the contract, and also the further sum of \$1650.00, being the balance unpaid by Adamick; ~~under the contract~~ that complainant paid \$4150.00, making the total sum of \$5,000.00, which complainant and defendant Adamick had agreed to pay to the corporation; that complainant was thereafter entitled to be subrogated to the rights of Adamick and to have the formula and detailed instructions for the preparation which had been deposited in the safety box delivered to him free from the claims of Adamick.

The bill further alleges that Bannerman died on July 14, 1915, and that his executor and William C. Bannerman, his only heir-at-law, were made parties to the bill. It is also alleged in the bill that Adamick refused to consent to the opening of the deposit box or to agree to permit Elliott to have access thereto; that thereby complainant is prevented from compounding

... of the deposit box or to agree to permit Elliott to have access ... in the bill that Adams had agreed to the opening ... of law, were made payable to the bill. It is also ... and that his executor and William C. Cunningham, his ... The bill further alleges that Cunningham also ... of Adams.

... and was deposited in the safety box delivered to him two days ... and detailed instructions for the preparation with ... to the rights of Adams and to have ... that complainant was therefore un- ... which complainant and defendant Adams had agreed ... making the total sum ... being the balance unpaid by Adams; ... and also the further ... that complainant Elliott paid the \$2,500.00 and in ... to make any further payments under ... made on February 28, 1915; that thereafter Adams re- ... the last of ... the last of

It is further alleged in the bill that Adams made ... person so making such payments was to be entitled ... whenever the full sum of five thousand dollars had ... to make payments in lieu of the one so default- ... other of them would ... Elliott or Adams should ... It was further alleged in the bill that the defendant ... as liquidated damages.

... and money paid thereunder was to be credited to the ... it, then the contract was to become null and void ... Elliott or Adams should fail to make the payments re-

or selling the said preparation which "possesses healing medicinal qualities to a high degree and is a valuable medicinal discovery." The bill further charges, in substance, that the formula is of great commercial value; that there were no other copies of said formula; that Adamick had no right or title or interest therein, and complainant prays in his bill that -

"The Safe Deposit Co. may be ordered and directed to open said safety deposit box and permit the appellant to have access to the contents thereof or that it deliver the contents thereof to the appellant and that said Adamick may be perpetually restrained and enjoined from making or asserting any claim against the Port Dearborn Safe Deposit Co. because it does so open said box and that the said Adamick might be further restrained from claiming any right, title or interest in or to the said formula for the preparation of said 'Bannerman Intravenous Solution,' and the detailed instructions for the use of same."

Also prayer for general relief.

In an answer filed by the defendant Adamick he alleged that the formula of compounding the preparation was, as a matter of fact, known to others than Bannerman and that he, Adamick, did not learn of such fact until after he had paid into the treasury of the corporation \$850. He admits the renting of the safety deposit box as alleged in the bill, but denies knowledge of the terms of the agreement for the opening of same. He admits failure to pay more than the sum of \$850, but asserts that no demand had ever been made upon him to pay the balance due under the contract. He denies the right of the complainant to have the safety box opened. He admits that the solution the formula for which is contained in the box is valuable, but he asserts that the formula is not secret, and that he, Adamick, has valuable rights and interest in said formula.

Adamick's defense appears from the pleadings to be that the formula in question was known to others than William Bannerman; that he paid \$850 under the contract into the corpora-

in selling the said preparation with "Bannerman" branding.
... to a high degree and is a valuable article.
... The bill further charges, in substance,
... is of great commercial value; that there
... of said formula; that Abraham and in
... or interest therein, and compensation payable in

... may be ordered and the
... to have access to the contents of the
... the contents thereof to the applicant and that
... may be lawfully retained and enforced
... or setting any claim against the contents
... because it does so open said box and
... might be further retained from
... or interest in or to the said
... for the preparation of said "Bannerman" formula
... and the detailed instructions for the use of

also proper for general relief.

In an answer filed by the defendant Abraham he
... the formula of compounding the preparation was, as
... of fact, known to others than Bannerman and that he,
... did not learn of such fact until after he had paid into
... of the corporation \$2500. He admits the renting of
... box as alleged in the bill, but denies knowing
... of the terms of the agreement for the opening of same. He
... to pay more than the sum of \$2500, but asserts
... had ever been made upon him to pay the balance due
... contract, he denies the truth of the complaint as
... the safety box opened. He admits that the solution was
... which is contained in the box is valuable, but he
... that the formula is not secret, and that, as Abraham,
... rights and interest in said formula.
Abraham's defense appears from the pleadings to be
... the formula in question was known to others than William
Bannerman; that he paid \$2500 under the contract into the corpora-

tion not knowing this fact; that he had never been called upon by anyone to pay the balance due by him under the contract. It is not denied that the complainant Elliott paid \$4,150 under the contract and that it was his privilege to pay the balance due by Adamick, which subrogated him to whatever right Adamick may have had under the contract.

The evidence shows that at a meeting of the directors of the corporation held the 19th day of April, 1915, consisting of Bannerman, Elliott and Adamick, a motion was made by Adamick, and adopted by the corporation, that the contract entered into between Bannerman, Adamick and Elliott be cancelled, and that the stock issued to Adamick be delivered to Bannerman. The evidence shows that the stock held by Adamick was in fact delivered by him to Bannerman, who held it for a few days and then returned it to Adamick. This resolution was adopted after Adamick and Elliott had each paid an aggregate sum of \$850 under the contract.

The motion adopted by the corporation is somewhat ambiguous as to what disposition the parties intended to make of the rights accruing to Elliott under the contract, and it does not appear that he was required to return the stock held by him in the corporation to Bannerman. It does appear, however, that on April 3, 1916, Elliott paid into the corporation \$1,650, making total payments by him of \$2,500, and on July 3, 1916, he paid an additional sum of \$1,650, which, under the terms of the contract, was then due by Adamick, and which complainant, in order to protect his investment, was permitted to pay in the event of Adamick's failure to do so.

It cannot be said that the suit is one having for its purpose the forfeiture of a contract; as we read the pleadings it appears to be rather a proceeding for its specific

It cannot be said that the suit is one having for its purpose the enforcement of a contract; as we read the language it appears to be rather a proceeding for the specific performance of this fact; that he had never been called upon by anyone to pay the balance due by him under the contract. It is not denied that the company want Willett paid under the contract and that it was his privilege to pay the balance due by Adamick, which empowered him to do so. The evidence shows that at a meeting of the directors of the corporation held the 18th day of April, 1910, consisting of Hanneman, Willett and Adamick, a motion was made by Adamick, and adopted by the corporation, that the corporation should enter into between Hanneman, Adamick and Willett a contract, and that the stock issued to Adamick be delivered to Hanneman. The evidence shows that the stock was delivered to Hanneman, and that the stock was delivered to Hanneman, and that the stock was delivered to Hanneman, and that the stock was delivered to Hanneman. This resolution was adopted after Adamick and Willett had each paid an amount of \$1,000 under the contract.

The motion adopted by the corporation is somewhat different as to what disposition the parties intended to make of the rights accruing to Willett under the contract, and it does not appear that he was required to return the stock sold by him in the corporation to Hanneman. It does appear, however, that on April 3, 1910, Willett paid into the corporation \$1,000, making total payments by him of \$1,000, and on July 3, 1910, he paid an additional sum of \$1,000, which, under the terms of the contract, was then due by Adamick, and which constituted, in order to protect his investment, was permitted to pay in the event of Adamick's failure to do so.

It cannot be said that the suit is one having for its purpose the enforcement of a contract; as we read the language it appears to be rather a proceeding for the specific performance of this fact; that he had never been called upon by anyone to pay the balance due by him under the contract. It is not denied that the company want Willett paid under the contract and that it was his privilege to pay the balance due by Adamick, which empowered him to do so. The evidence shows that at a meeting of the directors of the corporation held the 18th day of April, 1910, consisting of Hanneman, Willett and Adamick, a motion was made by Adamick, and adopted by the corporation, that the corporation should enter into between Hanneman, Adamick and Willett a contract, and that the stock issued to Adamick be delivered to Hanneman. The evidence shows that the stock was delivered to Hanneman, and that the stock was delivered to Hanneman, and that the stock was delivered to Hanneman. This resolution was adopted after Adamick and Willett had each paid an amount of \$1,000 under the contract.

performance; ~~and~~ there seems to be no question at all under the proof that Elliott, the complainant, has paid in good faith the sum of \$4,150 into the corporation; and that he was moved to do so by the promise of Bannerman to disclose ~~the~~ the formula and method for the preparation of the solution is equally clear. While Elliott seems to have been present at the time the motion referred to was adopted by the corporation, his rights under the contract cannot be said to have been abrogated in view of the subsequent conduct of the parties. At the time this motion was adopted Adamick had refused or failed to pay the balance due by him under the contract. Notwithstanding this it appears that the complainant, Elliott, paid not only the sum due by him thereunder, but also a balance of \$1,650 due by Adamick. We think this clearly gives him the right to the relief he seeks by his bill.

The position of the defendant Adamick under his answer is not easy to understand. If it be true, as he asserts, that the formula, which appears to ^{be} ~~the~~ the subject of controversy, is known to others and is not secret and hence is of no value to the complainant, it would follow that the knowledge of the formula would be of no value to defendant. Adamick and Elliott entered into a joint agreement with Bannerman, and even if it be conceded that Bannerman did not comply with the spirit or terms of the contract, this fact would not necessarily give Adamick the right to fail in his agreement with Elliott, who seems to have acted fairly throughout the transactions. Nor is there merit in the contention that the corporation had failed to make demands upon Adamick for the balance due by him under the contract. He admits ~~that~~ that at the meeting of the directors held April 19, 1915,

[illegible]

he announced that he would have nothing further to do with the company and would make no further payments, and that the motion referred to was adopted. This action did not, however, give either Bannerman or Adamick the right to so summarily dispose of complainant's rights under the contract. The contract was dated April 3, 1914, and Elliott and Adamick were required to pay the full amount due within two years, in such installments from time to time as required by the Board of Directors. The evidence shows that Adamick did not pay this money and in fact he states that about a year after making the contract he announced to the corporation that he would make no further payments. The corporation and Bannerman saw fit to treat the contract as valid, even after the adoption of the motion.

The evidence shows that Adamick failed to perform the terms of the contract. If it be true that he did so because the knowledge of the formula was in possession of others and that Bannerman had deceived him with reference thereto, he will not be permitted by his choice of conduct under the contract to dispose of whatever rights Elliott may have had thereunder. Elliott, the complainant, and Bannerman, saw fit to regard the contract as an existing obligation, and under such circumstances we are of the opinion that Elliott should be permitted to procure the formula and method for the preparation of the solution for which he appears to have paid in good faith the sum of \$4,150. The evidence, however, is far from showing that the formula in question is known to others, and the proof fairly tends to show that knowledge of this formula can only be acquired by access to the safety deposit box. The plaintiff does not seek by his bill a forfeiture of whatever rights defendant

may have as against Bannerman's estate or others; as stated, he seeks a specific performance of a contract to which he was a party and as to which he has complied with all its terms and requirements. Barrett v. Geisinger, 179 Ill. 240; Zemple v. Hughes, 235 Ill. 424; Telegraph Co. v. Canadian Telegraph Co., 103 Maine, 444. An application for the specific performance of a contract is addressed to the sound legal discretion of the trial court, but this legal discretion must be exercised in accordance with well settled principles of equity. Fowler v. Fowler, 204 Ill. 99. Even after the adoption of the motion referred to, the parties to the contract, with the exception of Adamick, treated it as valid and existing. "Where the contract purports to be a consummated contract the mere acceptance and adoption of it establishes mutuality and makes the contract binding on both parties." Ullsperger v. Meyers, 217 Ill. 262; Forthman v. Peters, 206 Ill. 159.

Whether the defendant Adamick had forfeited his right to the \$850.00 paid by him to the corporation is not before us for decision and we do not attempt to decide what, if any, right he may have as against the corporation or the estate of William Bannerman, deceased.

The decree of the Circuit Court will be reversed and the cause remanded to that court, with directions to enter a decree that the defendant, Fort Dearborn Safety Deposit Company, be directed to open safety deposit box No. 728, in its safety deposit vaults, and to permit the complainant Elliott to have access to the contents thereof, or that it deliver the contents thereof to said complainant; that defendant G. H. Adamick be perpetually restrained and enjoined by order of the court from making or asserting any claim against said Fort Dearborn Safety Deposit Company because of

... have an appeal from the judgment of the court; as stated,
in such a case the court is not bound to follow the
a party and as to which he has complied with all the terms
of the judgment. Harrell v. Galt, 179 Ill. 320; Wells
v. Wells, 179 Ill. 434; Telegraph Co. v. American Telephone
Co., 179 Ill. 444. An application for the specific per-
formance of a contract is addressed to the court legal dis-
cretion at the trial court, and this legal discretion must be
exercised in accordance with well settled principles of equity.
Wells v. Wells, 179 Ill. 434. When after the adoption of the
will is proved to, the parties to the contract, with the ex-
ception of Adams, executed it as valid and existing. "Where
the contract supposes to be a consummated contract the
same is binding and adoption of it established mutually and
since the contract binding on both parties." Wells v.
Wells, 179 Ill. 434; Wells v. Wells, 179 Ill. 434.
Whether the defendant Adams had forfeited his
claim in the \$250.00 paid by him to the corporation is not
before us for decision and we do not attempt to decide what
it may, right he may have as against the corporation or the
estate of William Knapp, deceased.
The decree of the Circuit Court will be reversed
and the cause remanded to that court, with directions to ex-
amine the evidence and the defendant, Post Newborn Safety Deposit
Company, be directed to open safety deposit box No. 722, in
the city of New York, and to permit the complainant
to have access to the contents thereof, on that it
delivers the contents thereof to said complainant; that he-
forehand be personally examined and enjoined
by order of the court from making or asserting any claim
against said Post Newborn Safety Deposit Company because of

its compliance with the decree of said court; and that said Adamick be perpetually restrained and enjoined from making any claim of right, title or interest in or to the formula for the preparation of the solution known as "Bannerman's Intravenous Solution" and the detailed instructions for the use of the same.

REVERSED AND REMANDED
WITH DIRECTIONS.

[illegible]

ANNA S. ANDERSON,
Appellee,
vs.
ELLA E. BANTA,
Appellant.

213 I.A. 659

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County in favor of the plaintiff, Anna S. Anderson, for the sum of \$500 and against Ella E. Banta.

On May 15, 1913, the plaintiff and her brother-in-law, W. A. Anderson, rented from defendant the first floor of a two-story building located at 7636 Stony Island avenue in the city of Chicago. The plaintiff occupied the premises in question for living rooms and for a stationery store. The written lease provided that the landlord should not be liable for any damages resulting from a failure to keep the premises in repair. The premises in question were stove-heated and it was necessary for plaintiff in emptying ashes or in procuring coal to go to the rear of the lot, passing from the building onto a porch or platform attached thereto, the floor of which was about 18 inches from the ground level.

Other tenants of defendant occupied the upper floor of the building and all of the tenants used the platform or porch and steps which lead therefrom to the ground in passing in and out of the building.

There is evidence in the record from which the jury were authorized to conclude that the steps were attached to the porch; that they were old, rotten and weak at the time of the accident and that they were used as part of a common-way by all

2131A.659

STATE OF NEW YORK
IN SENATE
JANUARY 10, 1911.

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

APRIL 10, 1909.

ALBANY:

THE STATE PRINTING OFFICE

1911.

THIS IS to certify that a judgment of the court of
Saratoga County in favor of the plaintiff, Mrs. J. J. Smith,
and for the sum of \$200 and against Mrs. M. M. Smith.

On May 10, 1910, the plaintiff and her husband
resided at the residence, known as the Smith residence, on the
first floor of a two-story building located at 1000 West 100th Avenue in
the city of Chicago. The plaintiff occupied the premises in
connection with living rooms and for a domestic use. The
plaintiff further provided that the plaintiff would not be liable
for any damages resulting from a failure to keep the premises
in repair. The premises in question were above-ground and is
not necessary for plaintiff in carrying on her business or in conducting
any other business of the lot, passing from the building
into a porch or platform attached thereto, the floor of which
was about 10 inches from the ground level.

Other tenants of defendant occupied the upper
floor of the building and all of the tenants used the platform
as a porch and steps which lead therefrom to the ground in passing
in and out of the building.

There is evidence in the record from which the jury
was instructed to conclude that the steps were placed on the
porch and were not used as a porch and were not used as a porch
and that they were used as part of a continuous way by all

tenants of the building.

The plaintiff sustained a broken leg and other injuries on January 14, 1915, when she attempted to carry a pan of hot ashes to the rear of the lot. She testified that she rented the premises from a Mr. McLean, defendant's agent, and that no repairs had been made upon the porch or steps from June 1, 1913, until the date of the accident; that five or six months before the accident she noticed that the steps appeared to be weak.

"It was slightly pulling from the porch at the time * * * I mean you could see the shaking when you walked both on the porch and steps. * * * It looked old and rotten, so far as I can express it. This step was there when I came there."

The evidence shows that there was ice upon the ground and about the steps and porch at the time of the accident. The plaintiff testified, and her testimony is corroborated by other evidence in the case, that her injuries were caused by the breaking away of the step from the porch as she was passing from the porch to the ground. A photograph introduced in evidence tends to show that the steps were out of repair at the time of the accident, and plaintiff says that sometime "in the fall of the year" she notified defendant of the condition of the steps of the porch and that defendant said "she would have a man there to fix them." Defendant admits the conversation referred to by plaintiff, but she denies that plaintiff had referred to the rear steps, or that she, defendant, had agreed to have them repaired.

From an examination of all the evidence introduced by both parties it is our opinion that the question of defendant's negligence and that of the contributory negligence of the plaintiff were clearly questions of fact for the jury.

There is evidence in the record which tends to prove that plaintiff's injuries were caused by an out-of-repair condition of the

interior of the building.

The plaintiff sustained a broken leg and other in-

juries on January 14, 1913, when she attempted to carry a box of
clothes to the rear of the lot. She testified that she reached

the entrance from a Mr. Nelson, defendant's agent, and that he

repeated and bent upon the porch or steps from June 1, 1913,

until the fall of the defendant; that five or six months before

the accident she noticed that the steps appeared to be weak.

It was difficult pulling from the porch at the time * * *

when she could see the shaking when she walked past on the porch

and steps. * * * It looked old and rotten, so far as I can see.

There is, this step was down when I came home."

The evidence shows that there was ice upon the

ground and about the steps and porch at the time of the acci-

dent. The plaintiff testified, and her testimony is corroborated

by other witnesses in the case, that her injuries were caused by

the breaking away of the step from the porch as she was passing

from the porch to the ground. A photograph introduced in evi-

dence tends to show that the steps were out of repair at the time

of the accident, and plaintiff says that something "in the fall of

the year" she noticed defendant of the condition of the steps

at the porch and that defendant said "she would have a man there

to fix them." Defendant admits the conversation referred to by

plaintiff, but she denies that plaintiff had referred to the

very thing, or that she, defendant, had agreed to have them re-

paired.

From an examination of all the evidence introduced

by both parties it is our opinion that the question of defend-

ant's negligence and that of the contributory negligence of

the plaintiff were of equal importance at that time.

There is evidence in the record which tends to prove that plain-

tiff's injuries were caused by an out-of-repair condition of the

steps which existed for some months before the date of the accident, and while the plaintiff says that she had some knowledge of this condition, the question of her contributory negligence, under the circumstances and in view of her testimony of notice to defendant and the promise to repair the steps, was properly left for the determination of the jury. Illinois Steel Co. v. Byska, 200 Ill. 285.

The photograph in question was admissible in evidence. While it appears that the picture was taken about a month after the accident occurred, the evidence tends to show that there had been no change in the condition of the steps and porch during that time. Plaintiff testified that nothing had been done at all to the steps during that time, and she said, "I think these pieces of boards, or whatever they are, are just where they were when I was hurt." Her testimony in this particular finds corroboration by that of another witness. The only objection made to the admission of the photograph was that it appeared to have been taken a month after the accident happened. This objection was cured by the evidence that no changes had occurred in the condition of that part of the premises shown by the picture during that time. Androczyew v. Spaulding & Merrick, 194 Ill. App. 471.

The court did not err in refusing to give instructions 1 and 2. The 1st instruction told the jury that if they believed from the evidence that the steps were in fact old and were in some degree rotten and weak and not safe to be used and that the plaintiff had frequent occasion to use the steps at and before her injuries and knew of their condition, she was not entitled to recover. This instruction is faulty for several reasons. We are not ready to hold that plaintiff would, as a matter of law, be barred from a right to recover, by knowledge of the condition of the steps, whether she had such knowledge and whether the

condition of the steps was such as to warn her of the danger in using them, were questions of fact for the jury. Mere knowledge of this condition would not, as a matter of law, preclude her.

Instruction No. 2 told the jury that if the plaintiff knew that defendant did not know of the dangerous condition of the steps, then it was the duty of plaintiff to notify defendant of such condition and that failing in this plaintiff could not recover. We know of no authority in support of the contention that this instruction correctly states the law.

The case of Boehn v. C. P. & St. L. Ry. Co., 152 Ill. 223, in no way supports the argument that a tenant using a common-way is in his own protection required as a matter of law to notify the landlord of such defects in the common-way.

The court did not err in refusing the two interrogatories tendered by defendant. The first interrogatory required the jury to answer whether the plaintiff at the time of her injuries knew the character of the steps from which she fell. An answer either way to this question would not determine the right of plaintiff to recover. Nor is it at all clear what is meant by the phrase "character of the steps." The second interrogatory is whether the plaintiff could, by the exercise of ordinary care, have known that the steps were not reasonably safe for her to put her weight upon under all the circumstances and facts shown by the evidence. We think this question was well calculated to mislead. The ultimate question in this connection which the jury were called upon to decide was whether the plaintiff was, under all the circumstances of the case, in the exercise of ordinary care for her own safety. The question for the jury was not whether the plaintiff could, by the exercise of ordinary care, have known of the condition of the steps, but whether, in the exercise of such care plaintiff was chargeable with such knowledge.

...tion of the case ... was not of the nature in
... were questions of fact for the jury, and knowledge
... would not, as a matter of law, preclude her.
... I told the jury that if the plain-
... defendant did not know of the dangerous condition
... it was the duty of plaintiff to notify defendant
... and that defendant and that falling in with plaintiff could
... know of no authority in support of the contrary.
... this instruction correctly states the law.
... The case of Herring v. W. L. & A. Co., 100 A. 102
... in no way supports the argument that a servant acting
... is in his own proper person required as a matter of law
... the liability of such persons in the common-law.
... The court did not act in refusing the two instruc-
... by defendant. The first interrogatory re-
... the jury to answer whether the plaintiff at the time of
... defendant knew the character of the steps from which she fell.
... answer either way to this question would not determine the
... plaintiff's liability to recover. For it is all clear that in
... of the phrase "character of the steps," the second in-
... is whether the plaintiff could, by the exercise of
... care, have known that the steps were not reasonably
... for her to get her walking upon under all the circumstances
... and facts shown by the evidence. We think this question was well
... to be raised. The ultimate question in this connection
... the jury were called upon to decide was whether the plain-
... under all the circumstances of the case, in the exercise
... of ordinary care for her own safety. The question for the jury
... was not whether the plaintiff could, by the exercise of ordinary
... care, have known of the condition of the steps, but whether, in
... the exercise of such care plaintiff can charge the defendant

In Elwood v. Chicago City Ry. Co., 90 Ill. App. 400.

the court in criticising an instruction said: "It is also bad as stating an incorrect rule, for there were many things which the plaintiff might have done while exercising ordinary care which would have avoided the injury." So here, it is not inconceivable that the plaintiff in the exercise of proper care either could or could not have known of the condition of the steps. Stated differently, if it be conceded that plaintiff could, in the exercise of ordinary care, have known of the condition of the steps, this fact would not, as a matter of law, preclude her right to recovery.

Finding no reversible error in the record, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 05-11-2010 BY 60322 UCBAW

all held against them after the fact, since the

224 - 24574

AMERICAN PAPER PRODUCTS CO.,
a corporation,

Appellee,

vs.

C. A. WATSON & SONS, a
corporation,

Appellant.

213 I.A. 659

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE OWEN
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in favor of plaintiff for the sum of \$97.50.

September 5, 1917, the plaintiff received an order from defendant for the delivery to it of 10,000 corrugated barrel caps "P. O. B. Farmington, Maine." At the same time the plaintiff ordered "10,000 16½ corrugated barrel caps at \$9.75 per M., P. O. B. McKnightstown, Pa." September 8, 1917, following the receipt of the order the defendant by letter instructed plaintiff that the goods ordered for delivery at McKnightstown must "reach there by September 25 as we will be packing at that time and must have them there, otherwise they would not be of any use to us. * * * If there is any doubt in your mind about your being able to make this delivery, please promptly advise us." In setting October 1, 1917, as the date for the delivery of the goods ordered for Farmington, Maine, the letter said: "If you are able to make these deliveries you might increase our Farmington, Maine, order to 15,000." In its reply to this letter the defendant wrote: "We have every reason to believe shipments will be made in ample time to reach destination at time specified in your letter."

Evidence introduced on the trial tends to prove

053 A.1812

1914

1948

that following this correspondence the plaintiff shipped 15,000 caps to Farmington, Maine, and from this fact, taken together with the language used in the letter of defendant, it may fairly be concluded that the plaintiff agreed to a modification of the original contract by agreeing upon September 25th for the delivery of the goods at McKnightstown, Pa. While the language of plaintiff's letter is somewhat ambiguous as to whether plaintiff actually promised to deliver these goods on the date referred to, we think its acceptance of the order for and delivery at Farmington, Maine, of 5,000 additional caps, which were to be delivered only in the event that plaintiff was able to make the deliveries at the time specified in defendant's letter of September 8, 1917, renders the original contract, which fixed no definite time for the delivery of the goods, specific with reference to the time for such delivery.

There is some dispute in the evidence as to whether plaintiff shipped the goods for delivery at McKnightstown on September 12, 1917, or on September 18, 1917. The evidence shows, however, that the goods in question did not arrive at McKnightstown until October 3, 1917, and that defendant refused to accept the shipment because it had arrived too late to be used by it. As stated, the contract between the parties required the delivery of the goods, which were to be used in packing fruit, by September 25, 1917, and it is our opinion that in its failure to deliver the goods at McKnightstown ~~by that date, 1917, the~~ ^{by that date,} the plaintiff did not comply with the terms of the contract. From the nature of the subject matter of the contract it may be inferred that the defendant knew the purpose for which these goods were to be used and that prompt delivery thereof was a matter of consequence to defendant. Legerwood v. Bushnell, 128 Ill. App. 555; Hagan v. Hawle, 143 Ill. App. 543.

THE COURT IN THIS CASE HAS CONSIDERED THE EVIDENCE PRESENTED BY THE PARTIES AND IS OF THE OPINION THAT THE DEFENDANT'S MOTION FOR A WRIT OF HABEAS CORPUS SHOULD BE GRANTED.

IT IS ORDERED THAT THE DEFENDANT BE RELEASED FROM CUSTODY.

DATED AT NEW YORK, N.Y., THIS 10TH DAY OF OCTOBER, 1967.

HONORABLE JUDGE OF THE SUPREME COURT

In Devine v. Edwards, 101 Ill. 141, the Supreme court said:

"Where it is the express contract that the property is to be shipped by the seller to the place of business of the purchaser, at the expense of the seller, then the place of delivery is the business place of the purchaser." (Benjamin on Sales, Sec. 693.

and in 21 Am. & Eng. Ency of Law, 1st ed., 536, it is said:

"Where the contract provides that the seller shall ship the goods to the place of business of a buyer and pay the freight, the place of delivery is the place of business of the buyer, and the seller can maintain no action until he has complied with this duty."

In Devine v. Edwards, supra, it was held that the words and letters "P. O. B. cars Aurora" were used as a short expression to indicate the place where the seller was to deliver the goods, as well as the fact that the expense of their delivery at that point was to be paid by the seller.

We think the court also erred in denying defendant the right to file his counter-claim. It is true that the counter-claim sets up damages accruing to defendant of \$2,500.

In Holmes v. Straus, 283 Ill. 621, the Supreme court on page 627 held that:

"While the defendant had the right, if he saw fit to do so, to bring in his counter-claim for an amount exceeding \$1000, the action being one of the fourth class the court could not render judgment thereon for more than \$1000."

The plaintiff moved in the trial court for leave to file his counter-claim and also for an order transferring the cause, which was of the fourth class, to the first class. The denial of the motion to so transfer the case was correct, but the trial court should have allowed defendant to file its counter-claim, which, if done, would have limited defendant's right of recovery to a sum not exceeding \$1000.

The judgment of the Municipal court is reversed and the cause is remanded for a new trial.

There is no question whether the property
is to be shipped by the carrier at the expense of the shipper or the consignee. The expense of the business is the expense of the shipper. (Continued)

It is a fact that the shipper of the goods is the one who is responsible for the expense of the business.

The contract provides that the carrier shall be responsible for the expense of the business of the shipper. The carrier is not responsible for the expense of the business of the shipper. The carrier is not responsible for the expense of the business of the shipper.

In Carroll v. Lewis, it was held that the

carrier and consignee, O. M. Lewis, were liable as a carrier.

The court in Carroll v. Lewis held that the carrier was liable for the expense of the business of the shipper. The court in Carroll v. Lewis held that the carrier was liable for the expense of the business of the shipper. The court in Carroll v. Lewis held that the carrier was liable for the expense of the business of the shipper.

We think the court also acted in denying damages.

The court in Carroll v. Lewis held that the carrier was liable for the expense of the business of the shipper. The court in Carroll v. Lewis held that the carrier was liable for the expense of the business of the shipper. The court in Carroll v. Lewis held that the carrier was liable for the expense of the business of the shipper.

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The court in Carroll v. Lewis held that the carrier was liable for the expense of the business of the shipper. The court in Carroll v. Lewis held that the carrier was liable for the expense of the business of the shipper. The court in Carroll v. Lewis held that the carrier was liable for the expense of the business of the shipper.

The plaintiff moved in the trial court for leave to

amend his complaint and also for an order transferring the

case, which was of the fourth class, to the first class. The

court in the motion to amend the complaint and to transfer the case was overruled, and the

case was allowed to remain in the fourth class. The court in the motion to amend the complaint and to transfer the case was overruled, and the

case was allowed to remain in the fourth class. The court in the motion to amend the complaint and to transfer the case was overruled, and the

case was allowed to remain in the fourth class. The court in the motion to amend the complaint and to transfer the case was overruled, and the

case was allowed to remain in the fourth class. The court in the motion to amend the complaint and to transfer the case was overruled, and the

The judgment of the trial court is reversed and

the case is remanded for a new trial.

233 - 24583

213 I.A. 659

EVERTS WRENN,
Appellant,

vs.

JOSEPH H. STRONG,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

The Municipal court of Chicago rendered a judgment in favor of the defendant, Joseph H. Strong, in a fourth class action begun in that court by Everts Wrenn, the plaintiff, who prosecutes this appeal.

The plaintiff, who is engaged in the life insurance business, filed a statement of claim which charged that the defendant was indebted to him for commissions due on the renewal premium paid for the year 1913, on a life insurance policy for the sum of \$25,000, dated September 9, 1912, on the life of James Viles.

In an affidavit of merits filed by the defendant, the defendant denied that any contract existed between him and plaintiff and that defendant was in any way indebted to plaintiff. The evidence shows that as a result of certain conversations and correspondence between the parties the plaintiff turned over to defendant certain life insurance business. The plaintiff testified that the matter in controversy had its inception in a conversation between plaintiff and defendant, in the course of which defendant agreed to pay plaintiff the usual commissions for the business turned over to him. It is admitted that policy No. 342171 was issued on the life of James Viles for the sum of \$25,000 on October 14, 1912.

Plaintiff testified that defendant in the conversa-

2131A.659

RECEIVED FROM NEWSPAPER BOARD

CHICAGO

THE CHICAGO TRIBUNE

CHICAGO, ILL., MONDAY, SEPTEMBER 14, 1932.

The Municipal Court of Chicago rendered a judgment in favor of the plaintiff, Joseph M. Brown, in a fourth class action in that court by Green Green, the plaintiff, who

The plaintiff, who is engaged in the life insurance business, filed a statement of claim which charged that the defendant was indebted to him for commissions due on the renewal of a life insurance policy for the year 1932, on a life insurance policy for \$25,000, dated September 9, 1932, on the life of

In an affidavit of motion filed by the defendant, the defendant denied that any contract existed between him and the plaintiff and that defendant was in any way indebted to plaintiff. The evidence shows that as a result of certain conversations between the parties the plaintiff was to defendant certain life insurance business. The defendant testified that the matter in controversy and its subject was a conversation between plaintiff and defendant, in which defendant agreed to pay plaintiff the sum of \$25,000 for the business turned over to him. It is admitted that policy No. 34317 was issued on the life of James Viles for the sum of \$25,000 on October 14, 1932. Plaintiff testified that defendant is the owner of

tion referred to agreed to pay him 45 per cent of the first annual premium paid on the policy and 5 per cent of each succeeding annual premium paid thereon, and that this was the commission usually paid under similar circumstances.

The defendant Strong admits the acceptance of the application for and the issuance of the \$25,000 policy, but he testified that he agreed to pay the plaintiff "the first year's commission and if he wrote the amount required in the company's contract I would pay him the renewals; that amount was \$50,000;" that he, the witness, at the time the contract was made exhibited to plaintiff a form of contract for the payment of commissions to agents, which contained the following sentence:

"Agreed that renewal commissions paid only after insurance in face value of \$50,000 has been written."

It is impossible to reconcile the testimony of these witnesses. They directly contradict each other as to what language formed the basis of their contractual relationship. So far as we know, the parties to the suit are equally reliable and there is nothing in the testimony of either that enables us to determine the truth of the disputed question of fact. In such circumstances this court cannot interfere with the judgment of the trial court, who had an opportunity to hear and see the witnesses.

The judgment of the Municipal court is affirmed.

AFFIRMED.

...to agree to pay him 40 per cent of the first year's premium on the policy and 1 per cent of each subsequent year's premium, and that this was the consideration paid under similar circumstances.

The defendant strongly admits the acceptance of the application for and the issuance of the \$25,000 policy, but he testifies that he agreed to pay the plaintiff "the first year's commission and if he were to pay him the remainder, that amount was \$50,000."

At the witness, at the time the contract was made exhibited to him a form of contract for the payment of commissions to the plaintiff containing the following sentence:

"I, the undersigned, do hereby agree to pay the plaintiff the sum of \$50,000 as a commission on the policy of \$25,000."

It is impossible to reconcile the testimony of these two witnesses. They directly contradict each other as to what was the basis of their contractual relationship. So far as we know, the parties to the suit are equally reliable and there is nothing in the testimony of either that enables us to determine the truth of the disputed question of fact. In such a case this court cannot interfere with the judgment of the jury, who had an opportunity to hear and see the witnesses. The judgment of the trial court is affirmed.

AFFIRMED.

MARGARET HANREDDY, as Executrix of
the Estate of Joseph Hanreddy,
deceased,

Defendant in Error,

vs.

CITY OF CHICAGO,

Plaintiff in Error.

213 I.A. 660

ERROR TO MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE HOLBOM DELIVERED THE OPINION OF THE COURT.

In a trial before the court on claim and counter claim or set-off, plaintiff's testator had judgment for \$7480.29, and the City asks a reversal on writ of error.

Joseph Hanreddy had for many years been a contractor engaged in paving and repairing city streets. His claim was divided into two parts: 1. For work and material furnished in repaving cuts in asphalt street pavements in Chicago under written contracts with the City, and for moneys due for work done and material furnished in relaying, repairing, etc., cuts and openings in asphalt pavements in streets and alleys of the City at the special instance and request of the City; and, 2. for repairing 800 square yards of asphalt pavement on Erie street between Franklin and Wells streets. An itemized bill of particulars was filed showing 175 different pieces of work done on more than sixty separate streets between December 13, 1905, and December 22, 1914, the charges totaling \$8283.

The City defended with a counter claim for \$21,055.42 for repairs claimed to have been made by it in pursuance of certain written contracts with Hanreddy. A bill of particulars was attached to this counter claim, although it appears that the counter claim was for unliquidated damages growing out of transactions unconnected with Hanreddy's claim. To this counter claim Hanreddy filed an affidavit of merits denying that the City did the work or

furnished the material claimed, and any indebtedness under written contracts between them; sets up an agreement made in October, 1914, that the City's department of public works should do the necessary maintenance work required by Hanreddy under his contract upon pavements laid by him for the City, the same to be done under the direction of the general superintendent of asphalt/ ^{repairs,} who should determine the amount and necessity of the work; that the City, in violation of the agreement, extended its authority to act for and bind Hanreddy by expending large sums in improvements and repairs not chargeable to him as necessary maintenance work, etc.

Defendant argued for reversal that the judgment is manifestly contrary to the weight of the evidence and that the counter claim should have been allowed; that about one-third of the claim (\$2752) was barred by the Statute of Limitations; that there was error in the admission and exclusion of evidence; that the court erred in its computations and in refusing to hear arguments in support of a motion for a new trial and in refusing to pass upon findings of fact and propositions of law submitted by defendant; and that the Hanreddy contract with the City is invalid.

Counsel for the City preface their argument with a prognosis that in the condition of the authorities in kindred cases the success of the City in this and like litigation is somewhat of a forlorn hope. In our view of the record before us and the law applicable to such condition and facts as are there found, we are inclined to agree with counsel's forecast.

Regarding the contention that the judgment is unsupported by the evidence, this case is in many of its prominent features, and particularly in regard to the manner of proving the claim, very similar to the case of McGovern v. City of Chicago, 281 Ill. 264. In the McGovern case, as in this case, the claim was largely proven by the employees of the City and by the City's vouchers given for work done. Upon the hearing it was

claimed that vouchers for the work had been issued and that Hanreddy should have been paid. Hanreddy disputed payment of the vouchers and upon the trial it was agreed that the parties should go over the items of the comptroller outside of court and ascertain which of the vouchers had been paid and which had not. This was done by agreement of the respective counsel, with the sanction of the court, and an adjournment was had for that purpose and the result showed that of the vouchers issued none excepting \$121 had been paid; a stipulation to this effect was entered into between the parties, and the City agreed also that the work done for which Hanreddy claimed payment had been performed and the amounts correctly computed.

Without recapitulating the evidence a careful search of it reveals that so far as Hanreddy's claim is concerned, it is abundantly proven and the finding of the trial Judge has ample support in the evidence. The contention that the judgment is not supported by the evidence is therefore baseless. In fact, there is no evidence in this record showing that Hanreddy's bills were ever very seriously disputed by any of the employees of the departments of the City having supervision and oversight of the repair work done.

In regard to the repairing done on the asphalt paving on Erie street, the original paving of which had been done by Hanreddy, the City contended that the repairing charged for by Hanreddy were repairs that he should have made under his paving contract. But it is proven beyond peradventure that the disintegration which made repairs necessary was the fault of the City in allowing the catch basins and sewers, where they intersect Erie street, to become clogged up by piles of sand and dirt, so that

...and vouchers for the work had been issued and cash paid.
They would have been paid. Kennedy disputed payment of the
...and upon the fact it was agreed that the parties should
...of the controller outside of court and away
...of the vouchers had been paid and which had not. This
...of the respective company, with the controller
...and an agreement was had for that purpose and the
...that of the vouchers issued one regarding this had
...a stipulation to this effect was entered into between
...and the City agreed also that the work done for which
...had been performed and the amounts due

Without mentioning the evidence a careful review
...to it to be that so far as Kennedy's claim is concerned, it is
...of the finding of the trial judge was made
...The contention that the business is
...in fact, there is
...in this record showing that Kennedy's bills were over
...of the expenditures
...of the record work

In regard to the repeating date on the receipts, it
...the original paying of which had been done by
...the City contended that the repeating checked for by
...that he should have been under his paying
...And it is proven beyond peradventure that the
...was the fault of the City
...whose work increased the
...to be made up by him at once and date so that

the rain, sewage and surface waters, mixed with impurities, did not drain off, resulting in water to the depth of from one to eight inches overflowing the Erie street pavement. This water, mud and sewage froze, so that when the spring thaws came the ice melted and left the asphalt pavement full of holes ranging in size from 20 by 8 feet to one yard square. The City's general claim inspector who inspected the street, as well as other witnesses, testified that the holes and disintegration of the asphalt were caused by the erosive action of the standing water and ice and was not due to any defect of material or labor furnished by Hanreddy.

The charges for this work made in the counter claim of the City on the theory that Hanreddy was bound to make the repairs under the maintenance provision of his contract, were disproved by the City's own experts. Disregarding the legal proposition that a claim for unliquidated damages unconnected with the contract in suit cannot be set off or recouped in such action (Higbie v. Rust, 211 Ill. 333), defendant not only failed to prove that the charges were maintenance charges, but the evidence establishes that they were not.

The attempt to invoke the Statute of Limitations upon the trial as a defense was abortive for the reason that such defense had not been pleaded. The limitation statute is a privilege and must, to be availed of, be specially pleaded. Lacking such a plea, the statute, if invocable, would be held to be waived. Ward v. Williams, 270 Ill. 547. Moreover, the limitation statute is raised for the first time in this court, which is too late. Bomers v. Pettys, 175 Ill. App. 168.

We discover no reversible error in the court's rulings upon the evidence. Nor do we discover any error in the court's computation in arriving at the amount of the judgment.

The contention that the contracts under which Han-

reddy did the work for which he seeks payment in this suit were void because for more than \$500 and should have been let to the lowest responsible bidder after advertising, is not well taken. If the contract was ultra vires, it should, to avail of such a defense, have been set up by an appropriate pleading. This was not done. City v. Peck, 196 Ill. 260. Had such a defense been pleaded and proven, it might have been successfully rebutted by proving that the contract had been subsequently ratified by the City. Moreover, as held by this court in McGovern v. City of Chicago, 202 Ill. App. 139, "the City in its repairing of streets acts in its business capacity, and as the contract was not for a specific sum in excess of \$500, advertisements for bids were not required." The purpose of the ordinance requiring advertising for bids is to ascertain the cost so that an appropriate ordinance may be passed authorizing a tax levy to meet such cost. However, this was not necessary, for, as held in the McGovern case, supra, the vehicle tax is by statute expressly made available for street repair work. Again, this point is fully covered adversely to the City's contention in the Supreme Court's decision in the McGovern case, supra, where it is said:

"The sole question, so far as the right to recover on the contract is concerned, is whether, after making the contract and after the contractor has fully performed according to its terms and conditions and as directed by the city officials, and after the city has thereby received the benefit of the work, labor and materials, the city is now in the position to set up the informalities and irregularities urged, under the circumstances of this case. * * *

"The contract sued on was of such a nature that the city could lawfully have entered into it. The city was charged with the duty of keeping its streets in repair for public use and was authorized by law to make the necessary expenditures and contracts for such purposes."

The contracts with Hanreddy in suit were within the power of the City to make, and as Hanreddy performed all the work under such contracts, the City having accepted such work cannot now evade payment therefor by urging the illegality of the contract, for as said in Drainage Commissioners v. Lewis, 101 Ill.

The court in United States v. Smith, 100 F.2d 1008, 1010 (9th Cir. 1936), held that the government's failure to produce the original document in a case involving a copy of a letterhead memorandum was not a fatal defect. The court stated that the copy was a true and correct reproduction of the original and that the government's failure to produce the original was not a violation of the rules of evidence. The court further stated that the copy was admissible in evidence and that the government's failure to produce the original was not a basis for reversal of the conviction.

[illegible]

1. The contract with Kentucky is not valid until the
pass of the City to make, and as Kentucky payment all the work
under such contract, the City having accepted such work under
and made payment therefor by taxing the Illinois of the com-
mission, for as said in Kentucky Commission v. Louisville, 101 Ky.

App. 152:

"The doctrine is firmly established in this State that where a municipal corporation enters into a contract that it may lawfully make, it will, when sued for the labor and material furnished and accepted, be estopped from setting up as a defense the irregular and unauthorized manner in which the contract was entered into. It cannot retain the fruits of the contract and escape liability upon the ground that its officers neglected to pursue the particular mode of contracting required by the statute."

A motion for a new trial in cases tried by the court without a jury is unnecessary, as it can serve no purpose whatever in preserving questions for review on appeal or error.

Climax Tag Co. v. American Tag Co., 234 Ill. 180.

The City also complains of the action of the trial Judge in not hearing oral argument on a motion for a new trial. In Steinke v. Wisner, 191 Ill. App. 172, it was held by this court, in an opinion written by Mr. Justice McGuire, that it was not error for the court trying cases without a jury to render a decision without hearing argument of counsel.

The record shows that propositions of law and special findings were tendered to the court more than two months subsequent to the conclusion of the trial and after the announcement by the court of its decision. The trial Judge ruled that they came too late, and we agree with him. The statute provides that such propositions and findings should be submitted before the commencement of the argument. In Flynn v. City, 197 Ill. App. 580, it was held that propositions of law submitted after the trial of the case were properly refused. Thompson v. Newman, 203 Ill. App. 317.

No reversible error appearing in this record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

31 - 24022

ANNA D. OLSON,
Plaintiff in Error.

vs.

JOHN C. OLSON,
Defendant in Error.

213 I.A. 660

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLBOM DELIVERED THE OPINION OF THE COURT.

This writ of error is undefended. The parties are husband and wife. Complainant seeks a divorce from her husband on the dual grounds of extreme and repeated cruelty and habitual drunkenness for the statutory period. Complainant also prayed that defendant be barred from all right and interest in and to certain real estate and personal property which she claimed she had accumulated with her own earnings. Defendant answered, denying all the material averments of the bill upon which complainant predicated her right to a divorce and other relief. Thereafter, by leave of court complainant filed an amendment to her bill, which did not materially change the issues. At the close of complainant's proofs defendant moved to dismiss the bill for want of equity, which motion was allowed.

An examination of the evidence discloses that the defendant was habitually drunk for a time exceeding two years prior to the filing of the bill; that he was likewise guilty of extreme and repeated cruelty toward complainant; that he threatened to kill her and that he threw a knife at her. Complainant testified that her husband had been drunk hundreds of times; that she had seen him drunk three or four times a week during three or four years preceding the trial, and had seen him so intoxicated that he could not hold a

knife and fork to eat with, and that he talked silly. The last time she saw him drunk was on the day she filed her bill. He was so drunk that he neglected his business, and to obtain money which he had not earned collected rents from complainant's property and at other times forced her to give him money. Eight witnesses other than complainant testified as to defendant's habits of intoxication and also to several acts of cruelty, and the daughter of the marriage testified that her father had numerous times threatened to kill the whole family.

This evidence uncontradicted entitled complainant to a decree of divorce and the other relief which she prayed.

The decree of the Circuit court is therefore reversed and the cause remanded for further proceedings consistent with the views herein expressed.

REVERSED AND REMANDED.

JAMES OZELLO,
Plaintiff in Error,
vs.
ALBERT HOFELD et al.,
Defendants in Error.

213 I.A. 630

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

The bill in this case involves the lease in case general number 24184, in which a judgment for rent due under the terms of said lease entered in the Municipal court of Chicago has this day been affirmed.

The bill in this case prayed for a cancellation of the lease above referred to and for an injunction restraining the entering of any judgments by confession or the institution or prosecution of suits thereon or enforcing writs of execution issued on two judgments by confession entered for rent under the terms of the lease in the Municipal court of Chicago.

A motion for a temporary injunction was argued before the learned chancellor and denied. The motion was based upon the face of the bill and as injunctive relief was the only relief sought, the bill was dismissed for want of equity and the cause is now before us for a review on writ of error.

What has been said in the law case supra is equally applicable to the bill before us. The bill proceeds upon the theory that the lease is a contract by which the parties agreed to violate the state law closing saloons on Sunday, and that each party being guilty of agreeing to a violation of the law, the contract is void.

We have held in case general number 24184 that the lease is not a contract for the violation of the state statute closing saloons on Sunday. There is a covenant in this lease that

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the business carried on upon the demised premises shall be conducted according to the laws of the state and the ordinances of the city, etc. The following provision is the one which it is contended renders the lease illegal and void:

"The lessee shall have the right to terminate this lease by giving to the lessors within thirty days after the closing of said saloon by the state or city authorities a sixty day written notice in the event that the State Sunday Closing Law is generally enforced in Chicago, or in the event that the City of Chicago shall discontinue the issuance of all saloon licenses."

As we have already held, we cannot construe this covenant as authorizing defendant to violate the so-called Sunday closing law. Furthermore, if defendant's contentions were well taken - which they are not - he could have done as he attempted to do in case supra - set up such defenses in a law action and in that way have preserved his rights to any action which might be brought against him upon the lease.

The bill states no case for injunctive relief.

Seeing no valid reason for disturbing the decree of the Circuit court, it is affirmed.

AFFIRMED.

1. The following provision is the one which it is suggested
 inserting in the laws of the State and the ordinance of the city.
 The section entitled on upon the subject of "shall be amended."

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50 - 24302

KEYWOOD BROTHERS and
KARFIELD COMPANY, a corporation,
Appellee,

vs.

REUBEN LEVINE,

Appellant.

213 I.A. 660

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

There was a judgment for \$76.55 on a trial before the court, and defendant appeals.

There is no controversy as to the amount of the claim, but defendant insists that one Sam Birnbaum is liable for the debt. It seems that Birnbaum leased to Levine a moving picture theatre; that chairs in the theatre were broken and that both Birnbaum and Levine went to plaintiff's place of business and selected the chairs which plaintiff sold to defendant and delivered to the theatre.

It is in evidence that Levine introduced Birnbaum to plaintiff's salesman as his manager. It is not disputed that defendant had a credit account with plaintiff and that Birnbaum had not.

There is sufficient evidence in this record from which the trial Judge might reasonably find that the transaction in suit was with defendant and that the credit was extended to him and not to Birnbaum. Statements of the account were several times rendered by plaintiff to defendant, and at no time, until the trial, did defendant repudiate his liability. While statements of the account were also sent by plaintiff to Birnbaum, they were so sent at the request of defendant. Such statements were, however, in the name of de-

fendant. and were at no time made out to Birnbaum.

The evidence abundantly sustains the contention of plaintiff that the transaction was with defendant and the credit extended to him and not to Birnbaum.

The finding and judgment of the Municipal court find support in a preponderance of the evidence in the record. and the judgment is therefore affirmed.

AFFIRMED.

...and it is not necessary to ...
The evidence ...
...the ...
...to ...
...the ...
...the ...

...

AMERICAN SALES BOOK COMPANY,
a corporation,

Appellee,

vs.

IRA BARNETT & COMPANY,
Appellant.

213 I.A. 660

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment of \$178.97 against defendant entered on the finding of the trial Judge to whom the cause was submitted for trial.

There are eight assignments of error, but we find no merit in any of them.

The claim is for the amount of the judgment for certain "Mll-Fisher Rolls" ordered of plaintiff by defendant in writing, which writing does not appear in the abstract.

Seven exhibits are mentioned by numbers in the abstract but are not otherwise abstracted. We will not, under well settled rules of procedure, go to the record to ascertain the contents of these exhibits. The abstract is the pleading of appellant, and if no reversible error appears therein, the judgment appealed from will be affirmed without consulting the record. Aside from a reference to these exhibits there is no evidence abstracted. In this condition of the record we are unable to say that the findings of fact in the record are not sustained by the evidence. The presumption of law in the absence of any evidence to the contrary in the abstract is, that the findings of fact are amply supported by the evidence which the trial judge heard.

2131.A.660

ALL MAIL FROM MEMBERSHIP

OF CHICAGO

AMERICAN BOOK COMPANY
APPEALS
THE AMERICAN BOOK COMPANY
CHICAGO, ILL.

This is an undated appeal from a judgment of the court in the case of the People vs. the Chicago & North Western Railway Company, No. 10,000, which was submitted for trial.

There are eight assignments of error, but no brief was filed in any of them.

The claim is for the amount of the judgment of the court, which was ordered to be paid by the Chicago & North Western Railway Company, which company does not appear in the record.

Seven exhibits are mentioned by number in the record, but are not separately described. It will not be necessary to set out the contents of these exhibits. The record is the finding of the jury, and it is no reversible error to set aside the finding of the jury, and the judgment appealed from will be affirmed. Aside from the record, there is no evidence introduced. In this

condition of the record we are unable to say that the finding of fact in the record was not sustained by the evidence. The presumption of law in the absence of any evidence to the contrary is in favor of the finding of fact, and the evidence which the

The trial judge was clothed with sufficient judicial discretion to set aside a judgment already entered and to substitute another and different judgment in its place if the evidence before him so warranted; and we are unable to say from the abstract that there was any lack of evidence to support the judgment finally entered and from which this appeal is prosecuted. It is not contended that the judgment was vacated at a time when the court had lost jurisdiction to do so.

The judgment of the Municipal court is affirmed.

AFFIRMED.

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PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

EDWIN L. HARVEY,

Plaintiff in Error.

213 I.A. 661

ERROR TO THE CRIMINAL COURT

OF COOK COUNTY.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty under an indictment for conspiracy and punished by a fine of \$750 and brings the cause here for review by writ of error.

The indictment consisted of three counts, and each concluded contrary to the statute. The first count charged defendant with conspiring on January 30, 1911, with one Duke M. Farson and others unknown, to obtain \$6000 of lawful money from Marie Zuremski, the same being her property.

In the second count the conspiracy to obtain the same amount from the same person was charged to have been done while defendant was in the employ and acting as the agent of Marie Zuremski, and the third count charges that the conspiracy was to obtain the money by means of the confidence game.

The evidence shadows forth that defendant, with others, under the cloak of religion attempted to perpetrate a glaring fraud upon Marie Zuremski by imposing upon her credulity, misinforming her of existing conditions and cheating her out of a large sum of money which was her lawful due.

As the judgment must be reversed and a new trial had for error in the trial judge's rulings upon the evidence, we refrain from at this time giving any opinion as to its probative force and value.

It appears from the testimony that the parties to

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INVESTIGATION OF THE
FEDERAL BUREAU OF INVESTIGATION
OF THE DEPARTMENT OF JUSTICE

REPORT OF THE AGENT IN CHARGE

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this alleged conspiracy were all either members of or interested in the Metropolitan Church Association and that either the Association or some of the parties, and particularly defendant, were interested in or operated a lodging house known as the "Vestibule Hotel" on Van Buren street, Chicago. In this lodging house in the fall of 1909 one Andrew Zuremski, a guest, was found dead and upon his person there was discovered by one Duff, in charge of the lodging house, a savings bank book in the First Trust and Savings Bank which showed a balance to the credit of the dead man of \$6181.35. Duff turned the book over to defendant, who remarked that "This was God's way of paying Duff's indebtedness to the church."

Andrew Zuremski's estate was administered by the Public Administrator, and defendant used one Beright, the principal witness at the trial, to search for Zuremski's heirs. Beright found that the widow, Marie Zuremski, lived in Jersey City in the State of New Jersey, to which place Beright, as he testifies, went at the instigation of defendant; that defendant in the presence of Duke W. Farson gave Beright his expense money to go to and return from Jersey City. Beright procured the widow to execute a document in which it was provided, among other things, that "all moneys over \$1500 received should go to Harvey," the defendant. This contract on Beright's return to Chicago he delivered to defendant. Beright concealed the facts in regard to the amount of the estate of Andrew Zuremski from Marie Zuremski.

Marie Zuremski was an ignorant woman who took in washing for a livelihood, and she told Beright that she was glad some money was coming to her. Defendant subsequently

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...were interested in or operated a lodging house
...on the "Vestibule Hotel" on Van Hook Street, Chicago.
...in this lodging house in the fall of 1929 one Andrew Luray
...was found dead and upon his person there was
...in charge of the lodging house, a
...in the first and savings bank which
...of \$2101.55.
...the book over to defendant, who remarked that
...of paying Matt's indebtedness to the

...the account of the estate of Andrew Knowlton from delivery to defendant. Knight procured the facts in re- leasement. This contract on Knight's return to Chicago he received over \$1500 receipted should be to Harvey," and the in which it was provided, among other things, that "if Mr. Knight procured the widow to execute a document ... his expense money to go to and return from Chicago ... that defendant is the progenitor of Mike S. Person rate ... he testified, went at the investigation of defendant ... City in the State of New Jersey, to which place ... Knight found that the widow, Maria Knowlton, lived ... the widow, the defendant, and the ... Knight's ... the estate of Andrew Knowlton from

and some money was taken to her. Defendant subsequently waiting for a livelihood, and she told defendant that she was Marie Bennett was an ignorant woman who took in Marie Bennett.

called Deright and told him that there was something wrong with the document which Mrs. Zuromski had signed and that he would have to make another trip and get another paper (which he handed to Deright) signed by the widow, and that he should explain to her that there was some error in the form of the first paper and that the one to be presented would be sufficient to consummate the matter; he added that there were sufficient funds in the bank book to liquidate Duff's indebtedness to the church. On the second trip the widow inquired of Deright as to what she was going to get, and he answered that there was possibly a thousand dollars and maybe more, which statement so made to the widow Deright communicated to defendant and Farson upon his return. A short time prior to the closing of Andrew Zuromski's estate defendant and Farson said to Deright that it was about time to settle the estate and to get their portion and asked Deright how much money he would need and he replied, "A thousand and perhaps fifteen hundred." He was then given three drafts drawn on Farson, Leach & Company of New York, each for \$500, with a letter of recommendation. Deright proceeded to New York, cashed the drafts, visited the widow, telling her that while the time for the court to give her the money had not arrived, that as she was a poor woman the church would advance it, settling with her by paying her \$1,000 from the money which he had received for the three \$500 drafts. Deright on his return trip went to Danville, Virginia, where defendant and Farson were holding revival meetings; he went there at the direction of both these parties. He saw them both and showed them the \$500 that he had left over, and defendant said, "You did well", and

called Delight and told him that there was something wrong
with the document which was, instrument had signed and that
he would have to make another trip and get another paper
(which he handed to Delight) signed by the widow, and that
he would explain to her that there was some error in the
form of the first paper and that she was to be presented
with a sufficient to consummate the matter; he added that
there were sufficient funds in the bank to liquidate
Delight's indebtedness to the church. On the second trip the
widow expressed to Delight as to what she was going to do,
and he advised that there was possibly a thousand dollars
and maybe more, which statement he made to the widow Delight
communicated to Delight and Delight upon his return. A
month later prior to the closing of Andrew Knickerbocker's estate
Delight and Delight said to Delight that it was about time
to settle the estate and to get their portion and asked De-
light how much money he would need and he replied, "I should
like to have fifteen hundred." He was then given three
hundred drawn on Delight, Lench & Company of New York, each
for five hundred, with a letter of recommendation. Delight pro-
ceeded to New York, secured the checks, visited the widow,
telling her that while the time for the court to give her
the money had not arrived, that as she was a poor woman she
would advance it, settling with her by paying her
it, and then the money which he had received for the three
hundred on his return trip went to Delight,
Delight, where Delight and Delight were holding Delight
Delight; he went there at the direction of both Delight
Delight. He saw them both and showed them the \$300 that he
had left over, and Delight said, "You did well," and

turning to Farson he said, "He got by for a thousand dollars." Defendant then remarked that they had got about \$5,000 or more, that they would pay the attorney \$500 and that the rest would be for their own use.

Under the last document signed by the widow, defendant gave a receipt to the Public Administrator for \$5,264, signed "Edwin L. Harvey, attorney in fact." This was the amount rightfully due the widow.

Defendant argues for reversal that the evidence fails to establish the conspiracy charged; also that defendant since January 30, 1911, was not a resident of the State of Illinois and that consequently the Statute of Limitations is a bar to the action; errors in rulings on evidence and instructions to the jury.

As there must be a new trial, we will not pass upon the weight of the evidence except to say that the jury might reasonably find from the evidence in the record that defendant from January 30, 1911, was not a resident of the State of Illinois, but that Waukesha in the State of Wisconsin was his place of residence during that time.

We find no error in the rulings of the court upon the instructions.

Deright testified, against the objection of defendant, that in August, 1914, long after the consummation of the conspiracy charged, he wrote three letters to defendant. Over objections he was allowed to give the substance of these letters. Among other things he testified: "I wrote to him" (meaning defendant) "and asked for an opportunity for a private conversation on a very important matter. I did not mention the matter." He further testified that the second letter was in substance about the same

...in person he said, "The fact is that a document exists."
...then remarked that they had got about \$5,000 or
...that they would pay the attorney fees and that the
...would be for their own use.

Under the last document signed by the witness
...gave a receipt to the Idaho Administrator for
...dated March 1, 1911, whereby, attorney in fact. This
...the amount definitely was the same.

Defendant argues for recovery that the evi-
...tells to establish the necessary charges; also that
...since January 30, 1911, was not a resident of the
...of Illinois and that consequently the estate of that
...is a bar to the action; argues in reliance on evidence
...to the jury.

As there must be a new trial, we will not now
...of the witness except to say that the jury
...tends to establish that from the evidence in the record that
...from January 30, 1911, was not a resident of the
...of Illinois, but that somewhere in the State he was
...his place of residence during that time.
...we find no error in the findings of the jury.

...the instructions.
...objection of the
...that in January, 1911, soon after the communication
...he was subsequently charged. He wrote three letters to the
...Over objections he was allowed to give the evi-
...of these letters. Among other things he testified
...wrote to him" (meaning defendant) and asked for an
...for a private conversation on a very important
...I did not mention any money. He further testi-
...that the second letter was in substance about the same

as the first; that in a third letter he told Mr. Harvey that he, Beright, wanted to talk with him about an important matter, and see that justice was done; that he was going to confess his part in the matter and that if defendant wanted to see him he would have to do so at once because he was going to New York to confess to the widow his part in the transaction and get her pardon if he could.

The court overruled the motion to strike out this testimony. This witness was also permitted, against the objection of defendant, to testify to a conversation which he had with Parson in 1911 or 1912, after the conspiracy ^{if any,} had been consummated and he had paid the money over to the widow. Among other things he testified: "I said, 'Mr. Parson, I don't feel right about that Zuromski estate transaction, and inasmuch as you folks got the money for the church, I am dismissing it from my conscience by leaving it to you.' He said, 'I feel all right about it.' I said, 'That is all right, then. I am through with the proposition as far as my conscience is concerned.'"

The admission of the foregoing testimony was most prejudicial to defendant, and as it was not admissible upon any theory, its admission is reversible error.

Defendant did not answer any of these letters, and in Beright's talk with Parson defendant was not present. The law to be applied to these objections is well stated in Greenleaf on Evidence, 14th ed., sec. 894, thus:

"The evidence of what was said and done by the other conspirators must be limited to their acts and declarations, made and done while the conspiracy was pending, and in furtherance of the design, what was said before or afterwards not being within the principles of admissibility."

Samuel v. The People, 121 Ill. 547; 2 Russell on Crimes, (7th Am. ed.) 696; Greenleaf on Evidence (7th ed.) Sec. 111;

at the first, then in a third letter he told Mr. Harvey
 that he, Harvey, wanted to talk with him about the
 contract between them, and that Justice was gone, that he
 was going to collect his part in the matter and that if
 Harvey wanted to see him he would have to do so at once.
 Harvey was going to New York to collect from the widow
 the part in the transaction and get her portion if he could.
 The court overruled the motion to strike out
 this testimony. This witness was also permitted, stating
 the relation of defendant, as readily to a conversation
 which he had with Harvey in 1911 or 1912, after the
 money had been consumed and he had paid the money over
 to the widow. Among other things he testified: "I said,
 'I don't feel right about that \$20,000 case
 transaction, and I'm sure as you know get the money for the
 case, I am thinking it from my conscience by feeling it
 to you.' He said, 'I feel all right about it.' I said,
 'That is all right, then. I am through with the proposition
 as far as my conscience is concerned.'"
 The admission of the foregoing testimony was
 not prejudicial to defendant, and as it was not inadmissible
 under any theory, the admission is reversible error.
 Defendant did not argue any of these points,
 and the People's case with these admissions was not presented.
 The law to be applied to these admissions is well settled in
 precedent on evidence, both civil and criminal.
 "The evidence of what was said was given by the
 other conspirators may be limited to their own and
 statements, made and some while the conspiracy was pending
 and in furtherance of the design, what was said before or
 afterwards not being within the hypothesis of relevancy."
 People v. The People, 131 Ill. 2d 111, 204 Ill. 2d 111.
 (The People, 131 Ill. 2d 111, 204 Ill. 2d 111.)

Ratten v. State, 6 Ohio St. 470.

For the error in admitting such evidence the judgment of the Criminal court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California.

The total area of land owned by the United States in California is approximately 100 million acres. This land is divided into several categories, including National Forests, National Monuments, and other public lands.

The following table shows the distribution of land ownership in California:

Category	Area (Acres)
National Forests	60,000,000
National Monuments	20,000,000
Other Public Lands	20,000,000

This information is based on the most recent available data and may be subject to change as new land is discovered or as existing land is reclassified.

2131.A. 661

FRANCES PRACHTHAUSER,
Plaintiff in Error,

vs.

FREDERICK PRACHTHAUSER and
F. A. VOGLER,
Defendants in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat in an action of trover for the value of a Packard Roadster automobile. The parties before the court are husband and wife, who have apparently become estranged from each other; hence this controversy.

Vogler purchased the Packard from his co-defendant, who was in possession without notice, actual or constructive, of plaintiff's claim. Plaintiff admits that her husband bought and paid for the Packard with his own money and that the car was kept in his garage, but sets up title in herself by gift. Plaintiff's claim rests mainly in the fact that her husband often referred to the car as her's and that she often drove the same. When he bought the car he stated that he was going to have his wife learn to drive it. It is not disputed, however, that both of them drove the car; that it was always kept in the garage of defendant; that he paid for its upkeep at all times and for the gasoline which it consumed. It is also in evidence that plaintiff gave her husband a bill of sale for the car prior to its sale to Vogler. This testimony falls far short of proving title in plaintiff.

The evidence in the record fails to sustain plaintiff's claim of title to the automobile in question, and the finding of the trial Judge to that effect was a correct conclusion upon the evidence; therefore the judgment of the Municipal court is affirmed.

AFFIRMED.

2131.A. 661

ERROR TO HONORARY JUDGE
OF CHICAGO

RECEIVED
JAN 10 1931
U.S. DISTRICT COURT
SOUTHERD DISTRICT OF ILLINOIS
CHICAGO

THE COURT HAS REVIEWED THE OPINION OF THE COURT.

This is an appeal from a judgment of the court in
a case to recover for the value of a Packard motor car and
the court before the court are husband and wife, who have ap-
peared in the case; estranged from each other; hence this controversy.
Vogler purchased the motor car from his co-defendant,
and was in possession without notice, actual or constructive, of
the claim. Plaintiff admits that her husband bought and
kept the Packard with his own money and that the car was kept
in his name, but sets up title in herself by gift. Plaintiff's
claim rests mainly in the fact that her husband often referred to
the car as her's and that she often drove the same. When he bought
the car he stated that he was going to have his wife learn to drive
it. It is not disputed, however, that both of them drove the car;
that it was always kept in the garage of defendant; that he paid for
the repairs at all times and for the gasoline which it consumed.
It is also in evidence that plaintiff gave her husband a bill of sale
for the car prior to its sale to Vogler. This testimony falls far
short of proving title in plaintiff.
The evidence in the record fails to establish plaintiff's
claim of title to the automobile in question, and it is the duty of the
court to find in that effect was a correct conclusion upon the evidence.
Therefore the judgment of the Municipal Court is affirmed.

186 - 24533

BENJAMIN MOORE & COMPANY,
a corporation, etc..
Appellant,

vs.

E. P. KINSHELLA doing business
as KINSHELLA VARNISH COMPANY,
Appellee.

2131.A. 661

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$22.35 in favor of defendant on its cross claim. There is no substantial controversy of fact between the parties. Plaintiff ordered of defendant in two different lots paint designated as "Genuine Venetian Red." The paint was used to paint the "Ursuline Convent" at Springfield, Illinois. Notwithstanding the paint was put on in a workmanlike manner and mixed with proper ingredients, it faded and spotted, and the cross claim is for reimbursement for the necessary cost of repainting the Convent.

The real issue is one of law, plaintiff contending that the paint sold was according to order. "Genuine Venetian Red," that defendant got just what it ordered and that there is no implication of warranty as to quality. On the other hand, defendant insists that there is an implied warranty that the article furnished was at least good Venetian Red paint.

We do not think that the defendant got what it bargained for. It bargained for red paint and did not get it. We think that when it ordered red paint, under whatever name, it became incumbent upon plaintiff to furnish paint which was red. The paint supplied was defective in quality as paint because it would not paint the color evenly. The fact that it faded and was spotted is conclusive evidence that the paint was not of merchantable quality, regardless of color.

We think that under Sec. 14 of the Uniform Sales Act

183 .A.1818

there was an implied warranty that the paint should correspond with the description, which in the instant case it did not; it was not "Genuine Venetian Red" by any reasonable interpretation which could be placed upon those words regardless of whatever particular shade of red the designation might mean. Defendant was entitled to a merchantable quality of red paint which would paint some even shade of red. This the paint furnished utterly failed to do. There being no express warranty as to color, the law would at least imply a warranty that the paint furnished would, when applied in a workmanlike manner, neither immediately fade nor be spotted.

Craig v. Pellett, 209 Ill. App. 368.

We see no reason on fact or principle which justifies our interference with the conclusion at which the Municipal court arrived and its judgment is therefore affirmed.

AFFIRMED.

210 - 24559

213 I.A. 661

JOHN FRITZMAN,
Appellee,

vs.

JOHN R. RICHARDSON, JOHN
CHONIN and HERMAN OTTEN,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action of trespass for unlawful arrest and false imprisonment. A trial before court and jury resulted in a verdict of guilty, with damages assessed at \$3,000 and a judgment thereon - on remittitur of \$1,000 - of \$2,000, from which judgment defendants prosecute this appeal.

The cause proceeded to trial on issues joined under an amended declaration, which in substance charged that defendants on May 10, 1915, laid violent hands on plaintiff, beat, bruised, wounded and illtreated him; that they arrested him at his electro-plating shop and imprisoned him without lawful authority for forty-eight hours thereafter. Special damage is averred to consist in plaintiff not being given an opportunity to lock up his shop before being taken away therefrom under arrest, which resulted in a large amount of his property therein being stolen therefrom and also damaged; that false and slanderous words were spoken of and concerning plaintiff by defendants in the presence of bystanders, accusing him of stealing goods from the Hot Point Electric Heating Company and others, and that as a result his business was ruined.

The evidence discloses that plaintiff operated an electro-plating shop for about six months before his arrest, in

21814.661

UNION REFORMATION SOCIETY
1000 COURT

THE
COURT
ROOM
NO. 10
CITY
HALL
BOSTON
MASS.

THE COURT: In this case, the plaintiff, Union Reformation Society, has brought a bill of exchange against the defendant, John J. ...
The bill of exchange is dated ... and is payable to the order of the plaintiff for the sum of ...
The defendant has pleaded that the bill is not validly issued and that the plaintiff is not entitled to recover the amount thereof.
The plaintiff has offered evidence to prove that the bill was lawfully issued and that the defendant is liable thereon.
The defendant has offered evidence to prove that the bill was not lawfully issued and that the plaintiff is not entitled to recover the amount thereof.
The court has heard the evidence and has concluded that the plaintiff has proved its case and that the defendant is liable on the bill.
The court has accordingly granted judgment in favor of the plaintiff for the amount of the bill, with interest and costs.
The defendant has appealed from this judgment and has asked for a new trial.
The court has heard the arguments of both parties and has concluded that the judgment should stand.
The court has accordingly denied the defendant's application for a new trial and has affirmed the judgment of the lower court.

The evidence shows that the bill was lawfully issued and that the defendant is liable thereon. The court has accordingly granted judgment in favor of the plaintiff for the amount of the bill, with interest and costs.

which he did electro-plating for the Hot Point Electric Heating Company, of which the defendant Richardson was superintendent; that the electro-plating was applied to parts of manufactured articles unassembled; that plaintiff called at the factory of the Hot Point Company for the articles which he electro-plated, and that such parts were delivered to him by a shipping clerk named Gosner and the articles when electro-plated were returned to the company by the plaintiff.

While much evidence proffered by defendants germane to their defense was erroneously excluded by the court, sufficient remains to establish the fact that Richardson had reason to suspect that his company was being robbed of articles which it manufactured. For the purpose of ferreting out the suspected thefts detectives were employed and from their research suspicion centered upon plaintiff and Gosner, the shipping clerk, and a detective discovered property of the Hot Point Company missing from its factory in the shop of plaintiff, which articles were not in possession of plaintiff for the purpose of electro-plating. Among these articles was a lot of asbestos heater cord. The cord was in the bottom of a box of articles taken from the company's plant by plaintiff to be electro-plated. Other articles belonging to the company were found in plaintiff's shop, none of which was there for electro-plating.

The evidence of the detective shows that he visited plaintiff and left a few small articles to be electro-plated and asked plaintiff if he had anything to sell; that after several visits by this detective to plaintiff's shop he bought from plaintiff a coffee percolator for \$10 and several small articles for \$5. These articles were all new, taken out of a box, wrapped in tissue paper, and were the property of the company. This occurrence was a few days before the day of plaintiff's arrest.

... his electro-plating for the last time ...
... which the defendant ...
... the electro-plating was applied to parts of machinery ...
... articles manufactured; that plaintiff ...
... the defendant ...
... and that such parts were delivered ...
... and the articles were returned ...
... by the company by the plaintiff.

While such evidence ...
... the court ...
... to establish ...
... of which ...
... for the purpose of ...
... were employed and from their ...
... and ...
... of the ...
... in the shop of plaintiff, which articles were ...
... for the purpose of ...

... among these articles was a lot of ...
... in the shop of ...
... to be electro-plated. ...
... in the company were found in plaintiff's shop, none of ...
... for electro-plating.

The evidence of the defendant ...
... and ...
... plaintiff ...
... by ...
... for ...
... were ...
... and ...
... was a lot of ...

Plaintiff claimed to have used the money received from the detective for redeeming certain rings from pawn.

The defendants Cronin and Otten were Chicago police officers, and they and plaintiff on May 10, 1915, the date of plaintiff's arrest, were at the plant of the company, plaintiff to collect a bill for work done, which was in dispute and which has, in our judgment, no bearing whatever upon the merits of this case. Cronin and Otten put Gosner under arrest and interrogated him in the presence of plaintiff regarding supposed thefts, whereupon plaintiff voluntarily and without coercion accompanied the defendants to his shop, where the officers searched for missing property of the Hot Point Company. The officers likewise examined the flat of the plaintiff and there found a considerable number of assembled articles and property of the Hot Point Company. With such articles plaintiff had no concern, as he had no means of assembling articles of this character and no such articles were in that form ever delivered to him for electro-plating. The articles so found were placed in the automobile of defendant Richardson, who with plaintiff and the two officers proceeded to a police station, where Richardson made a complaint in writing and plaintiff was thereupon arrested by the officer in charge of the station and placed in a cell. Thereupon Richardson left the station. Two days thereafter plaintiff was brought before a Municipal Judge at the Maxwell station and gave bail; the cause was not heard that day. It transpired that the complainant signed by Richardson had not, through some inadvertence, been sworn to; whereupon the Municipal court Judge swore him thereto.

On May 21st plaintiff was discharged, as we gather from the record of the Municipal court, for some irregularity in the proceedings. It appears that the larceny charged against plaintiff was confined to a lot of heater cord which was valued at \$15, making the case one of petty and not grand larceny. Gosner, the shipping clerk, was discharged at the same time as was plaintiff and has not since been heard of in this case.

plaintiff claims to have used the money received from the defendant's business to pay for the expenses of the defendant's business. The defendant claims to have used the money received from the plaintiff's business to pay for the expenses of the plaintiff's business. The court found in favor of the plaintiff and awarded him the money he claimed to have used for the expenses of his business.

Plaintiff complained that he was taken away from his shop without being given an opportunity to close it. The fact remains, however, that plaintiff's wife and his workman, Adam Werne, were in the shop when he left, as were also plaintiff's overalls, in the pocket of which was the key to the shop. The result of the shop being left open was, plaintiff claims, the loss of numerous articles, and that a coffee generator costing, as he claimed, \$1800 in cash and a smaller machine given in part payment, were greatly damaged.

The defendants Cronin and Otten were as police officers, upon indisputable surface appearances in this record, in the exercise of their judgment moving upon such appearances, authorized to arrest plaintiff without a warrant in virtue of Sec. 342, chap. 38 R. S., in which it is provided that "An arrest may be made by an officer * * without warrant * * when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

Plaintiff does not dispute the fact that the coil of electric heating wire found in his shop was not his property and that he was not lawfully in possession of it; and so with the coffee percolator and toasters sold by plaintiff to the detective, which plaintiff acknowledged he had received from Cosner, the shipping clerk, without paying therefor, selling the same to the detective for less than cost price and for less than they were worth. These were suspicious circumstances justifying a belief that plaintiff's possession of this property was not honest. These facts in evidence were sufficient to exculpate the defendant policemen, Cronin and Otten, from any liability in this action.

The fact that plaintiff was discharged upon the hearing in the Municipal court is of no importance in this class of action. If the action were for malicious prosecution it would be germane,

Plaintiff explained that he was taken away from his shop without being given an opportunity to close it. The fact, however, that plaintiff's wife and his children, who were in the shop when he left, as were also plaintiff's sister, in the pocket of which was the key to the shop. The result of the shop being left open was, plaintiff claims, the loss of numerous articles, and that a cotton generator operating on its motor, \$1800 in cash and a smaller machine given to him, were greatly damaged.

The defendant's counsel and others were as follows: That upon plaintiff's various statements in this regard, in the exercise of their judgment moving upon such appearance, the court is of the opinion that plaintiff is entitled to recover. It is the opinion of the court that "An answer may be made by an officer" - without warrant - when a criminal offense has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it.

Plaintiff does not dispute the fact that the call of electric hanging wire found in his shop was not his property and that he was not lawfully in possession of it; and so after the various statements and testimony made by plaintiff to the detective, which plaintiff acknowledged he had received from counsel, the call was checked, without paying therefor, selling the same to the detective for less than cost price and for less than they were worth. These were fraudulent circumstances justifying a belief that plaintiff's possession of this property was not honest.

These facts in evidence were sufficient to establish the defendant's possession, Guinn and others, from any liability in this case.

The fact that plaintiff was dishonest upon the hearing in the defendant's court is of no importance in this class of action. If the action were for malicious prosecution it would be different.

but being for unlawful arrest and false imprisonment, a discharge for whatever reason is unimportant. Acquittal of the crime charged upon hearing is not evidence that the arrest was unlawful or the imprisonment false. In McMahon v. The People, 189 Ill. 222, where the defendants were found guilty of an assault with intent to kill and murder, having theretofore been acquitted on a charge of the burglary in which the shooting was done, it was held that the verdict in the burglary case was immaterial and no defense to the other charge.

Plaintiff's whole testimony and claim are discredited in important particulars by their patent falsity. His attempt to predicate damage upon the claim that he was prevented from locking up his shop is baseless. His wife and servant were left in charge, with a key at hand to lock up the shop; and there is no evidence that the shop was in fact left unlocked by them. His attempt to impress the court and jury with the false claim that a coffee generator, costing him \$1800 and an old machine, was greatly damaged, is unavailing in the light of the proofs. He testified that he bought the generator from the Gregory Electric Company, the secretary of which company testified that the generator sold plaintiff, and the only one sold by his company to plaintiff, was sold to him with certain equipment for \$200. Plaintiff's attempt to prove that he borrowed from two friends \$500 and from another \$400 for the purpose of buying the generator, is unavailing in the light of the indisputable fact that the Gregory company, from whom he claims to have bought the generator, received but \$200 therefor. There is other testimony of plaintiff equally incredible.

The evidence does not sustain the charge that defendants unlawfully arrested or falsely imprisoned plaintiff. There is no evidence that plaintiff was maltreated or assaulted in any way by any of the defendants or that the slanderous words charged

were uttered by any of them.

The verdict and judgment are contrary to the weight of the evidence and not supported thereby; therefore the judgment of the Superior court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO

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THE UNIVERSITY OF CHICAGO

210 - 24559

FINDINGS OF FACT.

The court finds as ultimate facts that plaintiff was not unlawfully arrested or falsely imprisoned by the defendants or either of them as charged in plaintiff's amended declaration.

THE JOURNAL OF THE ROYAL SOCIETY OF MEDICINE
PUBLISHED BY THE SOCIETY'S SECRETARY
AT THE SOCIETY'S OFFICE, 11, BEDFORD SQUARE, LONDON, W.C.1
IN THE MONTH OF JANUARY, 1907.

130 - 23470

JOHN P. O'CONNOR et al.,
Appellants,

vs.

HIGH SCHOOL BOARD OF EDUCATION
OF EVANSTON HIGH SCHOOL DISTRICT
et al.,
Appellees.

278a
213 I.A. 662
APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McOURLY DELIVERED THE OPINION OF THE COURT.

By this chancery cause complainants question the validity of elections in the Evanston High School District with reference to a new site for the high school and the issuance of bonds to pay for the same. Upon hearing the chancellor found for the validity of the elections, and so decreed. From this complainants appealed to the Supreme Court. The subsequent history of the proceedings, with a statement of the facts and issues, appears in the opinions in this case reported in 278 Ill. 618, 209 Ill. App. 247, and 288 Ill. 120. We shall not now repeat the statement of the case except to recall that the first election, on November 6, 1916, was upon the proposition to build a new high school building upon a new site to be thereafter selected, and upon the proposition to issue school building bonds of the District to pay for the building and the new site. The second election was on December 11, 1916, and was for the purpose of selecting a new site or location; the result of this election was declared to be the selection of the Ridge avenue site, which is a considerable distance north of the present site of the high school.

We now consider the objections urged against the elections in the order presented to us by complainants.

It is first contended that under section 119, chapter 122, Illinois Statutes, defendants have no right to purchase a school site unless authorized by the voters at an election held for the specific purpose of voting "for or against the purchase of a building site," and it is asserted that in neither of the elections was the proposition "to purchase" a site voted upon. The statutory necessity of such a vote may be conceded, but defendants reply that there was such a vote, and we are of the opinion that this is the fact. Section 119 with reference to such an election is:

"It shall not be lawful for a board of directors to purchase or locate a school house site, or to purchase, build or move a school house, or to levy a tax to extend schools beyond nine months, without a vote of the people at an election called and conducted as required by section 198 of this act. A majority of the votes cast shall be necessary to authorize the directors to act. If no locality shall receive a majority of the votes, the directors may select a suitable site. The site selected by either method shall be the school site for such district."

Section 198 referred to prescribes the forms to be used in calling and holding an election to borrow money, but nothing is mentioned concerning an election on the question of a site.

In People v. Hinson, 98 Ill. 335, it was held that all the propositions involved in section 119 may be voted upon at once, the court saying:

"It does not require * * that but one single question should be submitted at any one election."

In Board of Education v. Carolan, 132 Ill. 110, it was held "competent to submit the propositions to purchase it (a site), to build a school house upon it and to issue the bonds, all at the same election." In Thompson v. School Trustees, 218 Ill. 540, it was held proper to include in the call for election a proposition to build a township high school and another for the selection of a site.

It is first understood that under section 110, Chapter 100, Illinois Statutes, the voters have no right to participate in the election of the members of the board of directors of the Chicago Public Library. The voters are asked to vote for the members of the board of directors of the Chicago Public Library. It is requested that in addition to the "Chicago Public Library" a vote be placed upon the following statement of such a vote may be recorded, but the statement is not to be recorded in the same manner as the other statements.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission has received information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission has received information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

In Wilson v. Levin, 67 Ill. App. 111 (115), the court said, upon the authority of People v. Sisson, 38 Ill. 133:

"The great nicety or precision ought not to be required in elections of this character, where school officers are not supposed to be learned in the law nor versed in legal technicalities. If the notice is reasonably sufficient to inform the voter as to the purposes of the election and the matters to be voted upon, we think the election should not be invalidated for want of absolute definiteness."

Substantially this same rule was stated in People v. Green, 265 Ill. 39, the court saying:

"A literal compliance with prescribed forms is not required in any case if the spirit of the law is not violated, and in all cases the intentions of the voters, clearly ascertained, should govern."

In the light of these principles, examination of the notice for the election in question leads clearly to the conclusion that the question of the purchase of a site was submitted to the voters and acted upon by them. The object of the election of November 8th was stated to be "for the purpose of voting 'for' or 'against' the proposition to build a new high school building * * * upon such new site as may be hereafter selected according to law"; and also "For the purpose of voting 'for' or 'against' the proposition to issue school building bonds of said district to the amount of Five Hundred Thousand Dollars (\$500,000) for the purpose of purchasing such new site when selected, and of paying the cost of building a new high school building on such new site."

We are of the opinion that this clearly presented to the voter the question of the purchase of a new site, and that no one could have understood it otherwise. Under the decisions above cited nothing else is necessary, and

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a copy of the original letter, and is signed by the President.

[illegible]

1444 467 The Great Lakes

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a formal address, and it begins with the words "I have the honor to acknowledge the receipt of your letter of the 28th inst."

1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that may be contributing to the problem. Once the problem has been identified, the next step is to develop a plan of action. This plan should outline the steps that will be taken to address the problem and the resources that will be required. The final step in the process is to implement the plan and monitor the progress. This involves a continuous evaluation of the situation and the effectiveness of the plan, with adjustments being made as necessary.

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10- The applicant for Extension has been advised to be "for this

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THE UNIVERSITY OF CHICAGO

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

and some of the other

we find no support for the contention that the proposition for purchase must be presented in a separate and isolated form. It is not so held in People v. I. A. A. I. A. A. Co., 279 Ill. 594, for there the proposition to build a school house on a proposed site and to issue bonds was defeated; the large majority of the voters were apparently in favor of purchasing no school site at all. It would follow that there had been no election authorizing the purchase of a site. We are of the opinion that the cases first above cited all support the claim that at the election of November 6th the proposition to purchase a site was sufficiently presented and voted upon.

It is next said that the elections are void because the vote was limited to those voters who wished to vote for some site other than the old site; that those who wished to retain the old site could not vote their preference. This claim is based upon the notice above quoted, which it is argued related to a new site only. This contention is untenable. The Evanston high school has been at its present site since 1862. The voters on November 6th were asked to vote for or against the proposition to build a new school house upon a new site thereafter to be selected, and manifestly all wishing to retain the present site could so vote by voting against a new site. This right could not be affected by any statements alleged to have been made by members of the board as to how the vote would be counted.

Furthermore, voters could vote for the present site at the election of December 11th. In the ballot the voters were instructed that if they wished to vote for any other site than those printed on the ballot they could do so by inserting such other site in the blank space which was pro-

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends of the Soviet Union (AFSU) in the United States. It is therefore impossible to say whether the AFSU is still active in the United States or whether it has been completely suppressed.

THE UNIVERSITY OF CHICAGO

There is a very high probability that the above information is correct. The information is being provided to you for your information only. This information is confidential. The information is being provided to you for your information only. This information is confidential.

1. The first step in the process of the investigation is to determine the scope of the problem. This involves identifying the specific areas of concern and the potential causes of the problem. Once the scope is determined, the next step is to gather data. This can be done through a variety of methods, including interviews, surveys, and observation. The data is then analyzed to identify patterns and trends. Finally, the results of the investigation are presented in a report, which provides recommendations for how to address the problem.

...from made by members of the Board as to how the case would

2017/2018 - 2019/2020

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also time spent printed on the subject they could do so by
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at the closing of December 1961. In the closing two years

vided for that purpose.

However, Thompson v. School Trustees, 218 Ill. 540, completely negatives this contention. There propositions for the selection of either of two designated sites were submitted, but a majority of the voters expressed their preference for another site, and the court held that the specification of the sites in the notice was surplusage, saying:

"It is within the province of the voters to select the site for the school house, and this right is not to be abridged by the directors in framing the notice or call for the election. It was entirely lawful for the voters at the election to cast their ballots expressing their choice of a site though the site so chosen was neither of those specified in the call or notice for the election."

The next objection presented is that both elections are void because neither was preceded by a petition of voters, and this is based upon the provision of section 127 of the School act, chapter 122, forbidding boards of education to purchase or locate a school house site unless authorized at an election "called for such purpose in pursuance of a petition signed by not fewer than five hundred legal voters of such district, or by one-fifth of all legal voters of such district." The absence of such a petition is admitted, but it is said that this section of the statute does not apply to the board of education of the Evanston high school district.

This district was organized in 1882, and prior to April, 1890, was controlled by the trustees of schools. A township board of education was then elected under the provisions of the statute of 1889 concerning schools, and the present individual defendants now constitute that board. This act of 1889 provided that high school districts should be administered by a Township Board of Education consisting

of five members, to choose their own president. In 1890 such a board was chosen. It is therefore apparent that this board is not such a board as provided by statute for the management of schools in districts of a specified population. Sec. 123 of chap. 122. These latter boards consist of six members and a president, and have different purposes and are wholly different from the "township boards of education" such as administer the Evanston high school district. Sections 85 to 97, chapter 122, relate to such township high schools. Section 91 provides:

"For the purpose of building school houses, supporting the school and paying other necessary expenses, the territory for the benefit of which a high school is established under any of the provisions of this act, shall be regarded as a school district, and the board of education thereof shall, in all respects, have the power and discharge the duties of school directors, for such district."

In Trustees of Schools v. People, 87 Ill. 303, this was held to mean that the powers and duties of such trustees were "the same as those of directors with respect to the district school." This is restated in Thompson v. School Trustees, 218 Ill. 540, and in People v. Cowan, 283 Ill. 328. Referring, therefore, to the provisions relating to school directors, sections 103 to 122, we find no provision for a petition for the instant elections, and therefore none was necessary. This conclusion is supported by the cases just cited, and also People v. Carter, 264 Ill. 42, and Trustees of Schools v. McMahon, 265 Ill. 83.

It is next contended that the election of December 11th is void because the Ridge avenue site, which was declared to be the winner, is not located at a "central point most convenient to a majority of the pupils of the township," which is required by section 86 of the School act. The most obvious reply to this is that this section relates to the duty of the school board when establishing a high school, and

[illegible]

is not any restriction or limitation upon the choice of the voters. Even if this condition was intended to apply to the choice of the voters, it would be presumed in the present case that a majority of the voters were of the opinion that the Ridge avenue site was a central point most convenient to a majority of the pupils. Now, then, could any court find to the contrary? A complete answer, however, is found in the decision in Thompson v. School Trustees, 218 Ill. 540, supra, where it was held that nothing the board might do could in any manner restrict the choice of the voters. Surely the legislature did not intend to dictate to or impose any restrictions upon the voters in the expression of their choice as to which school site was most convenient and desirable.

It is also urged against the validity of the election of December 11th that persons residing in portions of the townships of Niles and New Trier were permitted to vote, and that persons residing in these portions were not legal voters of the township of Evanston. It has been assumed for many years past that the Evanston high school district covered the territory of the township of Evanston and a portion of the township of New Trier lying north and a portion of the township of Niles lying west of the township of Evanston. These portions are shown in the record on a map, but a more particular or detailed description is hardly necessary in the consideration of the point before us. This territory was all part of the village of Evanston prior to March 29, 1892, and then of the city which succeeded

is an act of violence or intimidation upon the rights of the
people. When it is a crime, it is a crime to apply to the
people of the nation, it would be to demand in the present case
that a majority of the nation vote at the election that the
black woman life was a constant point most convenient to a
majority of the people. Now, then, would not court find in
the majority a majority of the people, however, is found in the
people in Thompson v. Thompson, 111 Ill. 540, 541, 542, 543.
where it was held that the people have the right to vote in any
matter relating to the choice of the voters. Surely the legis-
lature has no right to interfere to or impose any restrictions
upon the voters in the exercise of their choice as to which
party they will support.

It is also well known that the village of the
people of the nation with their persons residing in the
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It is also well known that the village of the
people of the township of Allen and a portion of the township
of New York have voted, and a portion of the township
of Allen have voted of the township of Allen. There
persons are shown in the record in a map, but a more
detailed description is hardly necessary.

the village on that date. Prior to 1891 section 38 of the school law of 1889 provided for calling an election with reference to the organization of a Township High School. In that year this section was amended by adding to it the following:

"When any city in this State having a population of not less than one thousand and not exceeding one hundred thousand inhabitants, lies within two or more townships, that township in which a majority of the city reside shall, with the city, constitute under this act a school township for high school purposes."

In 1909 the school law was revised, and this section was enacted as an independent section, where it now appears as section 90. Defendants contend that although this act relates to cities and was not applicable to Evanston while it was a village, yet when in March, 1892, it became a city this provision automatically applied, and thereby the whole territory within the city limits, including parts of the three townships, became the high school district. It is not controverted that the population of Evanston at that time and ever since was not less than 1,000 nor more than 100,000, and that a majority of the inhabitants of the city reside in the township of Evanston. It would seem to follow, therefore, in the light of this statute that any territory complying with its conditions shall constitute a school township for high school purposes, and that as the territory in question, including the portions of the townships of New Trier and Hill, comes within these statutory provisions, it constitutes a high school township, and that otherwise qualified legal voters residing in such territory were entitled to vote at the elections in question.

We find no merit in the contention that this amendment of 1891 can apply only to new districts because when

1. The first section was devoted to a general survey of the situation in the country.

1. The first step is to identify the problem. This involves understanding the situation and the needs of the people involved. It is important to listen to all sides and to be open to new ideas.

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U.S. GOVERNMENT PRINTING OFFICE

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680 To what extent is it true that the more people know about the world, the more they are likely to believe in God?

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first enacted it was an amendment to a section dealing with new districts. The rule is that if the intention of the legislature is plainly expressed, although in the form of a proviso, the proviso must be considered^{as} a legal enactment in itself. In re Day, 181 Ill. 73. In Trustees of Schools v. People, 161 Ill. 146, and in People v. Bruennemer, 158 Ill. 482, this amendment was applied to previously existing situations. A further conclusive suggestion is that after 1909, when the proviso was re-enacted as a separate, independent section, it was of general application, including the city of Evanston. It has been held many times that whenever the boundaries of any municipality are enlarged, all existing acts apply to the whole territory without any further steps. In People v. Gregier, 138 Ill. 401 (421), the court said:

"In the absence of any countervailing legislation, the ordinances of the city, upon the annexation of adjacent territory, eo instanti, of their own vigor, extend to and become operative over the annexed territory."

To the same effect are School Trustees v. School Inspectors, 214 Ill. 30, People v. Harrison, 191 Ill. 257, and People v. Chicago Telephone Co., 220 Ill. 238. In City of Indianapolis v. Heyin, 151 Ind. 139, the court said:

"Although a city or town may not have the required population when the act was passed, yet at any time in the future when any census taken after the passage of the act shows that the necessary population has been acquired, such city is governed by the provision of the act."

Neither is there merit in the contention that the application of the act to Evanston would be retroactive and therefore contrary to law. The rule is that a statutory enactment takes effect upon all cases existing at the time within its scope, and all others thereafter coming within its provisions are governed by it with like effect automatically. People v. Rumsey, 64 Ill.

44; O'Connor v. Laddy, 64 Ill. 299; State Board of Health v. Ross, 191 Ill. 87; United States v. Freight Ass'n, 166 U. S. 260; City of Lincoln v. Faria, 206 Ill. 426.

It appears by stipulation that the children of inhabitants of the territory in question have been admitted to the high school without payment of tuition, and that the citizens of the district generally have been aware of such fact since 1898. It also appears by admission that taxes have been levied for the maintenance and support of this high school over the entire territory in question since 1882. There is ample authority for holding, as we do, that where the conditions have been acquiesced in for such a length of time the courts will not disturb them.

Metz v. Anderson, 23 Ill. 463; Trustees v. School Directors, 88 Ill. 100; People v. Boyd, 132 Ill. 60; People v. Schnepf, 179 Ill. 305; Roule v. People, 205 Ill. 618.

A further objection is that polling places were located in the territory of Hiles and New Trier, which was not part of the district, and therefore that the votes at such polling places should not be counted. The territory referred to is that which we have just considered, and what we have there said disposes of the present point. That territory being legally within the township high school district, it follows that polls for a high school election could properly be located therein.

There was no error by the chancellor in refusing to receive in evidence and consider statements said to have been made by members of the board, or articles appearing in the newspapers concerning the election. No doubt there was much discussion, both orally and in print, upon the matter, intended to influence the voters upon a subject of great interest; but this could have no

bearing upon the legality of the elections. In the same category is any resolution passed by the board. Whatever they did, individually or collectively, may have had influence as indicating their opinion, but such action was merely advisory and not legally material; the sole question is whether the statutory requirements were observed.

We hold that both the elections of November 6th and of December 11th were properly called, and every question required by law to be determined by the voters was properly submitted and every statutory requirement properly observed, as the chancellor correctly found, and that the decree dismissing complainants' bill was right and it is affirmed.

AFFIRMED.

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35 - 24063

MARY BRADY,
Plaintiff in Error.

vs.

CONSUMERS' COMPANY,
Defendant in Error.

213 I.A. 662

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was a passenger upon a street car which had a collision with a truck of the Consumers' Company. She brought suit against the Consumers' Company to recover compensation for injuries. Upon trial by jury a verdict was returned finding defendant guilty and awarding plaintiff damages in the sum of \$25; upon this judgment was entered.

The only question plaintiff presents in this court is the amount of the judgment, which she argues is wholly inadequate under the evidence. It would make this a long opinion to give even a summary of the evidence touching plaintiff's physical condition. Apparently she was thrown from her seat in the car by the force of the collision, but beyond some slight cuts from some flying glass she suffered no objective injuries. She sought to prove that the accident had resulted in serious injuries to her side, and extreme nervousness with inability to work. There was sufficient evidence from which the jury could properly find that she had been suffering from some internal disorder for a considerable time before the accident, and had been under a physician's care for this disorder.

We cannot say that the jury was not justified in

believing that while plaintiff had expended considerable sums of money for services in connection with her health, that the ailments and disorders from which she suffered were in no way related to or caused by the accident in question.

Undoubtedly this court has power to and should set aside any judgment which appears to be inadequate; this has been done in many cases. In this case, however, after consideration of the stories of the witnesses, we are unable to say that the jury did not arrive at a conclusion reasonably justified under the evidence.

We see no sufficient reason to disturb the judgment and it is affirmed.

AFFIRMED.

47 - 24198

CITY OF CHICAGO,

Appellee.

vs.

GEORGE WATERS,

Appellant.

213 I.A. 662

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a fine against him of \$200 upon verdict by a jury in a trial charging him with the violation of an ordinance of the City of Chicago.

No stenographic report is before us showing the proceedings upon the trial, except a copy of the ordinance considered by the trial judge. The only point presented by defendant is that the information fails to charge an offense.

In the information appearing in the statutory record the acts charged against defendant are specifically set forth, and the complaint charges these to be a violation of the ordinance of the City of Chicago relative to stink balls, and such ordinance is described by its section number in the Revised Municipal Code of Chicago.

We are in accord with the holding in City v. Baranov, 189 Ill. App. 25, that if the information is not definite enough to suit the defendant he should move for a more specific one. This holding was based upon City v. Williams, 254 Ill. 360. In City v. Lesser, 196 Ill. App. 37, the court said: "A complaint charging defendant with violating a city ordinance sufficiently describes the offense and the ordinance violated, where the ordinance is described by the number of the section of the Municipal Code, and the acts he was charged with doing

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CHICAGO

NOV 19 1934

TO THE ATTORNEY GENERAL
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

RE: ALVIN KARPIS and EDWARD GEORGE BREMER - THE BREMER

Subsequent to the trial of the above named defendants, the following information was received from the Chicago Police Department, dated November 14, 1934, and is being furnished to you for your information:

The Chicago Police Department has received information from the Chicago Police Department, dated November 14, 1934, and is being furnished to you for your information:

The information appearing in the Chicago Police Department report, dated November 14, 1934, and is being furnished to you for your information:

The Chicago Police Department has received information from the Chicago Police Department, dated November 14, 1934, and is being furnished to you for your information:

It is noted that the Chicago Police Department report, dated November 14, 1934, and is being furnished to you for your information:

The Chicago Police Department has received information from the Chicago Police Department, dated November 14, 1934, and is being furnished to you for your information:

were also specifically set forth."

What is held in these cases is squarely applicable to the information under consideration, and we hold that the objection thereto is without merit. The judgment therefore is affirmed.

AFFIRMED.

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...in ...
...in ...
...in ...

213 I.A. 662

CITY OF CHICAGO,
Appellee,
vs.
GEORGE WATERS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

ADDITIONAL OPINION UPON PETITION FOR REHEARING.

Upon petition for rehearing by defendant it is said that on November 29, 1918, leave was given to defendant to file a copy of the stenographic report within ten days, and that such copy was filed in this court on December 7th. Such an order was entered, and upon search a stenographic report has been found bearing the file mark of the clerk of this court as filed December 7th. No record of such filing appears in the clerk's docket where all papers filed should be noted.

The copy of the stenographic report was not physically before us when we considered this case, and we relied upon the docket in making the statement in our opinion that "no stenographic report is before us showing the proceedings upon the trial," etc. The additional abstract filed contains nothing concerning the proceedings upon the trial, so that technically those proceedings are not properly before us. However, regardless of this irregularity, we have considered the assignment of error based upon alleged improper remarks of the court upon the trial, and hold that they were not sufficiently prejudicial to compel a reversal, and the judgment heretofore entered will not be changed.

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WESLEY L. THOMAS, doing business
as Royal Broom Co.,
Plaintiff in Error,

vs.

JOHN E. KAVANAGH, E. V. HUBBARD and
C. H. KAVANAGH, copartners trading
as Kavanagh Bros. & Co.,
Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for the alleged breach of contract by defendants in failing to deliver a car of broom corn pursuant to a contract made by telegrams and letters. Upon trial by the court finding was made for the defendants and suit ordered dismissed at plaintiff's costs.

As counsel for plaintiff in error now says, the first question is to determine the existence of the contract. We are of the opinion that the telegrams and letters in evidence do not constitute a contract, and that therefore plaintiff cannot recover for the breach alleged.

Defendants are brokers, and on September 2, 1916, plaintiff wrote to them saying, among other things:

"Now you will please advise us as to whether your party will let the car of corn go at 6½c and then we will advise you immediately re same."

Replying on September 5th, defendants wired:

"Your offer accepted advise shipment and we will get some off promptly."

On the same date a letter was sent to plaintiff reciting this telegram and adding:

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"We took it up with the owner, and he was willing to accept your price, 6½c. If you will let us know shipping directions, we will ship same to you promptly."

To this plaintiff made no response until September 18th, when apparently a letter was written to the defendants, but it is not in evidence and we do not know its contents except by inference. On September 26th defendants wrote to plaintiff saying in substance that the car on which they had previously quoted a price had been sold a few days thereafter, and that the market was then quite bare of corn and nothing could be had under 10 cents per pound, and offered to ship a car at that price if plaintiff so desired. To this plaintiff afterward replied demanding a car at 6¼ cents as per the first correspondence.

We are of the opinion that the first letter of plaintiff to the defendants, of September 2nd, was merely an inquiry as to whether the defendants' principal was willing to sell at the price named, and that plaintiff reserved the right when informed by defendants to accept it or decline. Defendants were not obligated to hold the corn awaiting a reply to their telegram of September 5th. So long as plaintiff held the matter open for his acceptance or otherwise, there was no binding obligation upon the parties, and hence no contract the breach of which would impose liabilities on either party.

The judgment of the trial court was right and is affirmed.

AFFIRMED.

167 - 24514

FRED C. AIKEN, Appellant.

vs.

PETER DICKEN and FREDERICK
SCHEPLER, copartners, trading
as Dicken & Schepler,
Appellees.

213 I.A. 662

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants, claiming that as real estate agents for him they had collected \$134.35 which they failed to deliver. Upon trial by the court judgment was entered against the defendant Schepler and suit dismissed as to Dicken, for the reason the court was of the opinion that Dicken was not liable. Plaintiff asserts by this appeal that both defendants are liable.

The amount is not in controversy, and that plaintiff is entitled to it is conceded. The sole question concerns Dicken's liability. On February 1, 1915, the two defendants entered into a partnership in the real estate, renting and rent collecting business under the firm name of Dicken & Schepler. They were employed by plaintiff to collect rents for him. On September 10, 1915, the two defendants agreed to dissolve the partnership and that Schepler should assume and agree to pay all the debts and liabilities; the two partners executed a contract to this effect. Plaintiff, however, continued to get statements and letters with reference to collections made for him, in the name of Dicken & Schepler, from early in 1915 to August 1, 1917; all the checks remitting collections to plaintiff

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were signed in the copartnership name. It also appears that the bank account of the concern was kept in the name of Dicken & Schepler. The sole question therefore is, did plaintiff have any notice of the dissolution of the partnership and the fact that Dicken had retired therefrom?

The rule is that if a withdrawing member of a partnership fails to give notice of the fact, his liability will continue unless he can prove real notice to the person seeking to hold him liable (Ellis, Admr. v. Bronson, 40 Ill. 455), and that a creditor without notice of such withdrawal may continue business relying upon the individual credit of the original partners. Arnold v. Hart, 176 Ill. 442.

The only testimony tending to show that plaintiff had any notice is that of Dicken, who says that in the fall of 1916 he went to plaintiff's office in the City Hall Square building and notified plaintiff in person that he had withdrawn from the firm. This is denied by plaintiff, and it is uncontradicted that he did not have an office in that building at the time of the alleged conversation. It is also uncontradicted that Schepler had fifteen or twenty conversations with plaintiff, in which the fact of Dicken's withdrawal was never mentioned except in the latter part of 1917.

It is not claimed that Dicken published any notice in the newspapers of his withdrawal from the firm or sent any written communication of this to the plaintiff. The alleged notice stands upon his unsupported testimony which is categorically denied.

We are of the opinion from consideration of the entire transaction that the record fails to show any notice to plaintiff which would relieve the defendant Dicken from liability. The judgment of the trial court

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The case is that it is a witness number of a

1. The only testimony tending to show that plaintiff
had no notice is that of Graham, who says that in the
fall of 1917 he went to plaintiff's office in the City Hall
to have his name added and inserted plaintiff in person told he had
no knowledge of the matter. This is denied by plaintiff, and
it is undisputed that he did not have an office in that
building at the time of the alleged conversation. It is also
undisputed that Graham had fifteen or twenty other names
with him, in which the name of Graham is written and
which he presented to the latter part of 1917.

It is not claimed that the witness mentioned any notice in the newspaper of the withdrawal from the two of one and within communication of this to the plaintiff. The alleged notice stands upon its own merits. The testimony which is contemporaneously contained in the report of the witness is not sufficient to establish the withdrawal from the plaintiff. The alleged notice stands upon its own merits. The testimony which is contemporaneously contained in the report of the witness is not sufficient to establish the withdrawal from the plaintiff.

will therefore be reversed, and judgment against both
defendants will be entered in this court for \$134.35.

REVERSED AND JUDGMENT HERE.

It is the policy of the Government to encourage the development of the country and to provide for the welfare of the people. This policy is based on the principle of self-reliance and the development of the country's resources. The Government is committed to the development of the country and to the welfare of the people.

The Government is committed to the development of the country and to the welfare of the people. This policy is based on the principle of self-reliance and the development of the country's resources. The Government is committed to the development of the country and to the welfare of the people.

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The Government is committed to the development of the country and to the welfare of the people. This policy is based on the principle of self-reliance and the development of the country's resources. The Government is committed to the development of the country and to the welfare of the people.

GEORGE ZAKOS, a minor, by his next
friend, CHRIST NAIMALIS,
Appellee,

vs.

PETER IALOGOS and LIRE GAKULAS,
trading as Lincoln Grocery &
Market Co.

On Appeal of PETER IALOGOS,
Appellant.

213 I.A. 663

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE MOSURELY DELIVERED THE OPINION OF THE COURT.

George Zakos, a minor, brought suit in the Municipal Court to recover wages said to be due him from the defendants, who had employed him in and about their store. Upon trial by the court plaintiff had judgment for \$470, which defendant who appeals says should be reversed.

The only point presented in argument is the truthfulness of plaintiff's witnesses. It is unnecessary to relate the conflicting and variant stories of the contending parties, and it would be very difficult, if not impossible, for the reviewing court from the printed record to determine satisfactorily the whole truth of the matter. This is peculiarly a case where we must give weight to the conclusion of the trial judge, who saw the witnesses and heard them testify, and could much better pass upon their respective credibility than we can.

It is wholly a question of fact, and we cannot say that the judgment of the trial court was contrary to the weight of the evidence; therefore the judgment is affirmed.

AFFIRMED.

2131.A. 668

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

EXEMPT FROM DISCLOSURE
DATE 10/1/88 BY 1043

THIS DOCUMENT CONTAINS
NEITHER RECOMMENDATIONS
NOR CONCLUSIONS OF THE
FEDERAL BUREAU OF INVESTIGATION

THE FOLLOWING IS A SUMMARY OF THE FACTS OF THE CASE.

George Jones, a white male, was in the vicinity of the scene of the crime on the date of the crime. He was employed by the defendant at the time of the crime. He was not employed by the defendant at the time of the crime. He was not employed by the defendant at the time of the crime.

The only point presented in evidence is the fact that the defendant was in the vicinity of the scene of the crime on the date of the crime. It is unnecessary to prove that the defendant was in the vicinity of the scene of the crime on the date of the crime. It is unnecessary to prove that the defendant was in the vicinity of the scene of the crime on the date of the crime.

It is the duty of the jury to determine the facts of the case. It is the duty of the jury to determine the facts of the case. It is the duty of the jury to determine the facts of the case. It is the duty of the jury to determine the facts of the case.

213 - 24562

213 I.A. 663

AMERICAN PAPER PRODUCTS COMPANY,
a corporation.

Appellee.

vs.

NATIONAL CLOCK & MANUFACTURING
COMPANY, a corporation.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

Suit was brought to recover the sum of \$606.93 for goods, wares and merchandise sold and delivered by plaintiff to the defendant. Plaintiff had judgment, from which defendant appeals, contending that plaintiff is a foreign corporation doing business in this state without having complied with the provisions of our statutes (chap. 32, secs. 67b and 67c, Hurd's), and therefore has no right to maintain a suit in this state.

Plaintiff is a Missouri corporation, and sold goods in Chicago through Mr. C. A. Wrigley, an assistant treasurer, who also represented other companies. From the evidence it appears that the lease of the office which he occupied was in his name and that he personally paid the rent. He testified that he had the name of plaintiff placed on the office door and paid for it himself, and that at his expense the name of the company appeared in the Chicago telephone directory; that he had no authority to accept or reject orders, but entered them on blank forms furnished by the home office at St. Louis, where they were sent for final action. Invoices and letters pertaining to the account in question emanated from the latter point.

Defendant seems to have been unable to disprove the assertions made by Wrigley, but insists in effect that if such an arrangement existed as is claimed it was a

SI 31 A. 663

ALBERT FROM
NEW YORK COUNTY
OF CHICAGO.

THE COURT
IN THE
MATTER OF
THE ESTATE OF
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OF THE ESTATE OF
ALBERT FROM
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BY WILL
ADMINISTRATOR

IT IS ORDERED THAT THE COURT SHALL HAVE THE OPINION OF THE COURT

BY COURT was brought to recover the sum of \$200.00 for

goods, wares and merchandise sold and delivered by plaintiff

to the defendant. Plaintiff had judgment, from which defendant

appeals, contending that plaintiff is a foreign corporation

and is not a citizen of this state without having complied with the

provisions of our statutes (Chapter 22, sec. 275 and 276, Stats.).

and therefore has no right to maintain a suit in this state.

Plaintiff is a Missouri corporation, and sold goods

in Chicago through Mr. C. A. Wiegley, an assistant treasurer,

and also represented other companies. From the evidence it

appears that the lease of the office which he occupied was in

his name and that he personally paid the rent. He testified

that he had the name of plaintiff placed on the office door

and paid for it himself, and that at his expense the name of

the company appeared in the Chicago telephone directory; that

he had no authority to accept or reject orders, but entered

them on blank forms furnished by the same office at St. Louis,

where they were sent for final action. Invoices and letters

pertaining to the account in question emanated from the

latter point.

Defendant seems to have been unable to disprove

the account as made by Wiegley, but insists in effect that

if such an arrangement existed as is claimed it was a

secret one between plaintiff and its Chicago branch and was not binding on the defendant. This claim is hardly borne out by the record.

We are of the opinion that the facts and circumstances of the present controversy place it in the class of cases which hold that such plaintiff corporations are not engaged in business in Illinois in a manner such as under the statute deprives them of the right to bring suit.

In Sleepy Eye Milling Co. v. Hartman, 184 Ill. App. 308, the court said:

"Upon the contention that the plaintiff Company is a foreign corporation and not licensed to do business in this State, the contention is untenable for the reason that the record discloses that the contract of sale was made and the acceptance of the same was done in the State of Minnesota at the home of the plaintiff corporation and not in Springfield, Illinois, and the evidence does not disclose that the plaintiff had or maintained any agent in the State of Illinois through whom these contracts were made, but that the party who defendants insist was an agent and through whom the contracts were made was a general broker, not only handling the flour of the plaintiff Company but of other mills, and the greater weight and preponderance of the evidence discloses that the contract was not made in the State of Illinois."

And in Pressed Radiator Co. v. Hughes, 155 Ill. App. 80, it is held that the place where a contract is made does not depend upon the place where it is actually written, signed and dated, but where it is delivered and accepted as consummating the bargain; and where an agent employed by a foreign corporation in a state having a restrictive statute solicits orders, and an order so procured is sent by him to the home office of such foreign corporation for acceptance, and the order is there accepted, the corporation is not deemed to be "doing business" within the meaning of the restrictive statute. See also American Sales Book Co. v. Wemple, 168 Ill. App. 639.

It is not deemed to be "doing business" within the meaning of the statute, and the order is there accepted, the corporation by him to the home office of such foreign corporation for statute solicitor orders, and an order so presented is sent by a foreign corporation in a state having a restrictive as commencing the bargain; and where an agent employed and dated, but where it is delivered and accepted, it is held that the place where a contract is made does not depend upon the place where it is actually written.

See Express Register Co. v. Hubbs, 128 Ill. 297, 20.

contract was not made in the State of Illinois." Company but of other cities, and the greater extent of the evidence of the evidence disclosed that the Illinois through whom these contracts were made, but Illinois had or maintained any agency in the State of Illinois, and the evidence does not disclose that the Illinois corporation and not in Springfield, same was done in the State of Minnesota at the time of sale was made and the acceptance of the contract in this State, the corporation in Minnesota is a foreign corporation and not licensed to do business in this State, the corporation in Minnesota. When the corporation that the plaintiff Company.

the court said:

in Illinois vs. Illinois Co. v. Hubbs, 128 Ill.

the statute deprives them of the right to bring suit. engaged in business in Illinois in a manner such as under cases which hold that such plaintiff corporations are not parties of the controversy place it in the class of. We are of the opinion that the facts and circumstances by the record.

not making on the defendant. This claim is hereby denied

between plaintiff and the Chicago branch and was

The ruling of the trial court on testimony touching the authority of plaintiff's agent, while open to criticism on strict rules of evidence, does not in our opinion call for reversal; the presence or absence of the negative answer complained of would in the circumstances have had no material bearing on the ultimate result of the proceedings.

For the reasons indicated the judgment of the Municipal Court will be affirmed.

AFFIRMED.

The ruling of the trial court on testimony
regarding the authority of Plaintiff's agent, while upon
a question as to the value of evidence, does not in
any manner call for reversal. The presence or absence
of the evidence is a matter complained of would in the absence
of any error and no material bearing on the ultimate result
of the proceedings.

For the reasons indicated the judgment of the
trial court is affirmed. The case is remanded to the
trial court for the purpose of conducting a new trial
on the issue of the value of the evidence. The costs of
the appeal are to be paid by the appellant. The case is
remanded to the trial court for the purpose of conducting
a new trial on the issue of the value of the evidence.
The costs of the appeal are to be paid by the appellant.
The case is remanded to the trial court for the purpose
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are to be paid by the appellant. The case is remanded
to the trial court for the purpose of conducting a new
trial on the issue of the value of the evidence. The
costs of the appeal are to be paid by the appellant.

REVEREND

THE COURT

DOES ORDER

THE CASE

208 - 24131

WHITING PAPER COMPANY,
a corporation.

Appellee.

Vs.

FROUDFIT LOOSE LEAF SALES
COMPANY, a corporation.

Appellant.

213 I.A. 663

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

The Whiting Paper Company, a corporation,
brought suit in attachment against the Froudfit Loose
Leaf Sales Company, a corporation, basing its right
to the attachment on the statutory ground, as stated
in the affidavit for attachment, that the plaintiff
was about fraudulently to conceal, assign or other-
wise dispose of its property and effects so as to
hinder and delay its creditors. The amount claimed
to be due plaintiff was \$250.73. The case was tried
before the court without a jury, the attachment was
sustained, and there was a finding in favor of plain-
tiff for the amount of its claim upon which judgment
was entered.

The defendant contends that the court abused
its discretion in refusing it a continuance. The case
had been continued twice, on whose motion or for what
reason, does not appear, and when it was called for
trial the defendant moved that the case be again con-
tinued, and in support of the motion submitted an affi-

2131.A.003

THE FOLLOWING IS A SUMMARY OF THE FACTS OF THE CASE:

1. The case is a summary of the facts of the case.

2. The case is a summary of the facts of the case.

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deavit of one R. L. Hurd, which set up in substance that he was the general manager of the defendant; that he was informed that the case was set for trial on August 20, 1917, but that he verily believed that he would not be able to be in Chicago before September 20, 1917; that he was trustee in a bankruptcy proceeding in New York where he then was; that there were several cases pending in New York, where he as such trustee was one of the parties; that he was the only person having knowledge of the matters involved in those cases, and that he was held there under subpoena as a necessary and material witness; that he was required to make a full report to the referee in bankruptcy; that at the time the instant case was brought the defendant was not indebted to plaintiff in excess of \$50; that the goods attached were worth more than \$1,000; that affiant was informed and believed that since this suit was brought "plaintiffs have had work done properly chargeable to them and which should be credited to these defendants, which said work is of a greater value than \$50.00, so that in truth and in fact a judgment will be rendered against plaintiffs and in favor of defendants when the issues are tried;" that he was the only witness who could testify to the facts material to the issues; that the defendant was amply able to pay all of its obligations to plaintiff; that he is an attorney at law, having had years of practice, and was well versed in the laws of New York, and that he would be liable to be held in contempt of court should he leave the matters there pending; that he verily believed that if the matters were postponed until September 20, 1917,

he could be present. This affidavit purports to be subscribed and sworn to on the 16th day of September, 1917.

The affidavit is insufficient for several reasons. The case had been continued twice before, and there is no showing why the application for a continuance was not made until it was reached for trial, nor is there any showing why the deposition of the witness could not have been taken. It is true that counsel in their brief say that there was not sufficient time to take the deposition, but if the affidavit had shown that he really meant to do so, no doubt the court would have acted favorably. Counsel further states that the deposition would not fully take the place of the witness; that he desired the witness to be present to assist him in the trial of the case. No such suggestion was made, however, on the motion for a continuance. The affidavit is further deficient in that it does not set forth the facts to which the witness would testify if present, and does not show diligence. Sec. 62, Chap. 110 R.S.

Complaint is also made that the court erred in sustaining the attachment, on the ground that the evidence was insufficient. It is further stated that a traverse to the affidavit for attachment was filed by the defendant. No such traverse appears in the record. The ground for attachment was therefore not in issue. (Jaycox v. King, 66 Ill. 182; Iowle v. Lamphere, 3 Ill. App. 369; Hawkins v. Albright, 70 Ill. 97.) but was admitted. Hopkins v. Medley, 97 Ill. 402. But in no event is the point well taken, for we think the evidence was sufficient. It discloses that the defendant was in business in Chicago; that its place of business was closed up and the machinery attached delivered to Well

Brothers, its general manager had gone to New York, and there was no intimation that it intended to resume business here.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WYOMING

SECTION 16 TOWNSHIP 14 NORTH RANGE 10 WEST

SECTION 17

SECTION 18

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SECTION 33
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SECTION 35

SECTION 36

SECTION 37
SECTION 38

SECTION 39
SECTION 40

SECTION 41
SECTION 42

THOMAS H. KELLY,

Appellee

vs.

THE SUPREME COURT OF THE
INDEPENDENT ORDER FOR FOR-
ESTERS,

Appellant

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

Thomas H. Kelly brought suit in the Municipal
Court of Chicago against the Supreme Court of the Inde-
pendent Order of Foresters to recover \$500 claimed to
be due him by virtue of a benefit certificate issued
to him. There was a verdict and judgment in his favor
for the amount of his claim, to reverse which defendant
prosecutes this appeal.

On a former trial of this case where the re-
sult was the same an appeal was prosecuted to this court,
and the judgment was reversed and the cause remanded.
(195 Ill. App. 501) The facts are there fully set forth
and will not be repeated here. While the facts now be-
fore us are in the main the same as on the former appeal,
yet we think on the whole plaintiff's case is somewhat
strengthened by the evidence. Furthermore, the verdict
on the former trial finding that certain dues had been
paid by the plaintiff, and which we held was manifestly
against the weight of the evidence, was general; while
on the retrial of the case, in addition to the general

100-11-10

RECEIVED
JAN 10 1964
U.S. DEPT. OF JUSTICE

MEMORANDUM
TO : DIRECTOR, FBI
FROM : SAC, NEW YORK
SUBJECT: [Illegible]

Reference is made to New York letter to Bureau dated 1/8/64.

verdict there was a special interrogatory submitted to the jury, which was answered specifically finding that the payment of the dues had been made.

A number of points are made and argued by the defendant on questions of law. Most of these points were determined by us on the former appeal and are not now open for further discussion.

The defendant argues that the judgment is wrong and should be reversed because the benefit certificate which is the basis of the suit is payable in five annual installments and does not justify the entry of a judgment for the full amount as was done. Plaintiff in reply seems to admit that this contention is well taken, but seeks to obviate its force by saying that this is an action of the fourth class and if the evidence shows he is entitled to recover the amount of the verdict the judgment should be affirmed, although his cause of action was not properly described in the statement of claim; and further contends that it is an action for a breach of contract and not an action on the contract itself. Obviously this is no answer to the defendant's point. The action is specifically brought on the contract, and it is the only action that plaintiff could maintain. But a complete answer to the defendant's point is that it is made for the first time on this appeal. There have been three trials of this case, and we have been unable to discover that the point now made was ever suggested until the present appeal. Courts of review are estab-

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lished to correct errors of the trial court, if any. But the point now made having been waived on three successive trials, cannot now be urged for the first time.

The next point made by the defendant is that even if the dues were sent by plaintiff by mail, this would not prevent plaintiff's suspension, for the reason that the agent of the local lodge to whom the dues were sent was not the agent of the Supreme Court of the order. The person representing the local lodge to whom the dues were said to have been sent was authorized to collect dues and send them to the Supreme Court, and there was evidence tending to show that such agent had authorized the mailing of dues to him. Love v. Modern Woodman, 259 Ill. 102; Dromgold v. Royal Neighbors, 261 Ill. 60.

It is also claimed that there was error in permitting a witness to testify to the contents of the letter in which the dues were sent to the defendant. This evidence of course was properly admitted, as there was notice served on counsel to produce the letter and defendant's counsel on the trial said he did not know whether they had the letter or not.

Defendant also urges that certain necessary steps were not taken to secure payment of the claim before instituting suit. There is no merit in this contention, for the reason that defendant denied all liability, and the law does not require plaintiff to do a useless thing.

The judgment of the Municipal Court of Chicago is affirmed.



226 - 24151

HYMAN J. HIMMELSTEIN,

Appellee,

vs.

THE RILEY-SCHUBERT-GROSSMAN CO.,
a corporation,

Appellant.

213 I.A. 664

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Hyman J. Himmelstein brought suit against The Riley-Schubert-Grossman Co. to recover the balance of salary claimed to be due for the year 1916, amounting to \$1266. There was a verdict and judgment in his favor for \$1117, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff in 1915 was a salesman in the employ of the defendant, receiving for his services a salary and commissions on sales made by him. Plaintiff's contention as testified to by him is that in the latter part of 1915, he entered into a contract with the defendant whereby he was to receive for his services for 1916, \$5,000 and commissions on sales made by him; that it was agreed that he could draw from time to time \$3,000 of his salary, and at the end of the year the balance would be paid; that he drew \$55 per week, making a total of \$2860, and at the end of the year he requested the balance; that the president of the defendant stated he did not have the money, but that plaintiff would be paid; that he was afterwards paid from time to time on account of this salary sum

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aggregating \$875, making a total of \$3735 and leaving a balance of \$1265, for which plaintiff brought suit; that at the beginning of 1917 plaintiff continued in the employ of the defendant on the same basis, and worked until July following, when he left defendant's employ.

The defendant's contention was, as testified to by Mr. Grossman, its president, that the agreement made in the latter part of the year 1915 was that plaintiff should receive \$55 per week salary and commissions on sales, and that he stated to plaintiff that this salary and commissions would amount to more than \$5,000, and that there was no agreement that plaintiff was to receive \$5,000 salary and commissions. He further testified that for the year 1916, the defendant paid plaintiff \$6000.51, and therefore there was nothing due. The defendant filed a set-off claiming that during the early part of 1917 it had advanced sums to plaintiff aggregating \$875, which the defendant claimed was due it from the plaintiff.

From this it clearly appears that the only question in controversy was: What salary was plaintiff to receive for the year 1916, \$5,000 as testified by the plaintiff, or \$55 per week as testified by defendant?

The defendant first contends that the court committed error in admitting improper evidence on behalf of the plaintiff. The record discloses that when plaintiff was being cross-examined by defendant's counsel, plaintiff identified checks aggregating \$875 given by defendant to plaintiff in 1917, and on re-direct examination counsel for plaintiff offered in evidence "a number of statements for commissions covering the period of time beginning

January, 1917, to June, 1917." To the introduction of these defendant objected that the offer was in regard to commissions for 1917, which were not in dispute. The court thereupon stated, "I think the whole bunch is probably immaterial," evidently meaning the checks identified by plaintiff for the \$875 as well as the statements for the commissions. Thereupon the defendant stated he did not offer the checks identified, and the court said that if defendant did not later offer them he would then strike out the statements, but thought if defendant introduced the identified checks the plaintiff's statements should be admitted. Thereupon counsel for defendant said, "All right" and later, "I think it is all material as a matter of fact, in view of the fact that he testified he was working in 1917 under the same contract." From this it appears that defendant was apparently satisfied with the ruling of the court and cannot now complain. In this connection the defendant also complains of the remarks of the court, namely: "The only thing is, as I have stated, that the issue is very simple, and I didn't think any of these commission checks, either the bunch here or the other bunch, made much difference." It is said that this statement tended to minimize the evidence offered by defendant. This objection was not made on the trial, and in fact no objection of any kind was made to the remark of the court, but for aught that appears the defendant was entirely satisfied. If counsel thought the remark was prejudicial he should have objected and the error, if any, might have been corrected, but since he did not do this he cannot now claim that there was error committed. Belt Railway Co. v. Confrey, 111 Ill. App. 473; Langquist v. City of Chicago, 200 Ill. 69.

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... for 1917, which was not in dispute. The
... then stated, "I think the whole thing is over
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Counsel also says that by reason of this action of the court the jury refused to allow its set-off for \$875. We think there is no merit in the point. The \$875 was allowed in plaintiff's affidavit of claim for he only claimed \$1265, and there is no dispute in the evidence that he drew \$65 per week as salary during 1916, and if plaintiff's position that he was to receive a salary of \$5,000 is true, defendant was given credit for the \$875.

The defendant next contends that the verdict is contrary to the evidence; that under the evidence plaintiff was entitled to recover \$1265, or the defendant was entitled to \$875 on its set-off, and that since the verdict was for \$1117, it is not supported by the evidence. The jury, of course, found that plaintiff was to receive \$5,000 salary. There were a number of checks and statements introduced in evidence which are not abstracted, and we cannot say that the jury was not warranted in giving the defendant credit for the difference between plaintiff's claim and the verdict.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

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254 - 24179

HERBERT BOILER COMPANY,
a corporation.

Appellee.

vs.

AMERICAN HEATING & PLUMBING
CORPORATION and RICHARD CURRAN,

RICHARD CURRAN.

Appellant.

213 I.A. 664

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The Herbert Boiler Company, a corporation, brought suit in the Municipal Court of Chicago against the American Heating & Plumbing Corporation and Richard Curran to recover \$100, the balance of the purchase price of two steam boilers. The case was tried before the court without a jury, and there was a finding against the plaintiff as to the American Heating & Plumbing Corporation, and a further finding against the defendant Richard Curran and in favor of the plaintiff for the amount of its claim and judgment was entered on the finding, to reverse which Curran prosecutes this appeal.

The first point made by counsel for Curran is that the finding and judgment are manifestly against the weight of the evidence. In the argument it is not pointed out how this is so, and therefore the question is not before us, for a point made and not argued is waived.

It is next argued that as plaintiff's claim is

2131.A.664

The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the American Telephone and Telegraph Company, for the year ending December 31, 1913.

The names of the persons who have been appointed to the various committees of the Board of Directors of the American Telephone and Telegraph Company, for the year ending December 31, 1913, are as follows:

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The names of the persons who have been appointed to the various committees of the Board of Directors of the American Telephone and Telegraph Company, for the year ending December 31, 1913, are as follows:

based on a contract made by the two defendants, and both having been served, the judgment is erroneous, for in such case the judgment must run against all the defendants or none. This contention seems to be conceded by the plaintiff to be true as a general proposition, but plaintiff claims that there is an exception to this rule, where it appears that one of the defendants was an unnecessary or improper party. And as we understand it the argument is that the evidence disclosed that the American Heating & Plumbing Corporation was an unnecessary party. We have recently had occasion to pass on this precise question in the case of Wulfauf v. Chasman & Treas. Fred. Co., et al. 309 Ill. App. 291, where we held that it was error to enter judgment in a contract case in favor of one defendant and against the other. We there had occasion to review the authorities relied upon by plaintiff and held that they were not applicable to the facts. We there said: "Where a declaration or statement of claim charges a joint liability, and one of the defendants shows that he was never liable, a recovery cannot be had against the other without dismissing the defendant not liable and amending the declaration or statement of claim by omitting the charge of joint liability, unless some of the defendants made a personal defense as infancy, lunacy, bankruptcy or the like. Fuller v. Robb, 36 Ill. 246; Polsenthal v. Barand, 86 Ill. 230; Han v. Allen, 179 Ill. App. 223; Grand Pacific Hotel Co. v. Pinkerton, supra. Plaintiff admits this to be the general rule, but claims there is an exception where one of the defendants has been improperly joined, as where he is not a party to the contract in suit, and in support of this contention, the cases of Carnegie v. Dawney, 178 Ill. App. 413; Grand Pacific

Hotel Co. v. Pinkerton, supra; Beyer v. Brensinger, 180 Ill. 110, are cited. We have examined all of the authorities cited, and, in addition, numerous cases decided by this and the Supreme Court of this State, and other authorities, and we have been unable to find a case where a finding and judgment was made in favor of one defendant and against the other. In the Bayney, Pinkerton and Brensinger cases, supra, the defendant against whom no liability was proven was dismissed out of the case." In the case of Robinson v. Brown, 82 Ill. 279, cited by plaintiff, it does not appear that the question now under consideration was presented.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

570 - 23915

CENTRAL TRUST COMPANY OF ILLINOIS
Trustee of the CONSOLIDATED MOTION
PICTURE CORPORATION, a corporation.
Bankrupt.

213 I.A. 664

Defendant in Error.

ERROR TO

vs.

MUNICIPAL COURT

OF CHICAGO.

SIMON SIMANSKY, Impleaded with LEOPOLD
SIMON, individually and trading as
SIMON & SIMANSKY.

Plaintiff in Error.

MR. JUSTICE TAYLOR delivered the opinion of the
court.

The plaintiff as trustee of the lessee corporation brought suit to recover \$1800.00, being the amount of a deposit which the lessee had placed with the lessor of certain premises, as security for faithful performance by the lessee. The premises were known as 4346 and 4348 West Madison street, Chicago.

The plaintiff alleged that his claim was for \$1800.00, and interest from November 15, 1913, amounting to \$210.00, for money deposited by the Consolidated Motion Picture Corporation, as lessee, with the defendant, Simon Simansky and one Leopold Simon as lessors. It was also set up in the statement of claim that a bankruptcy petition was filed by the lessee on December, 2, 1914, and that pursuant to the provisions of the bankruptcy act the plaintiff as trustee in bankruptcy terminated the lease in question. Further that the defendant and his co-lessee termi-

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nated the lease on or about November 14, 1914, and took possession of the premises and therefore were bound to return the \$1800.00 which had been deposited as collateral security, and that as the lessor had suffered no actual damages the plaintiff was entitled to principal and interest amounting to \$2016.00.

The defendant filed an affidavit of merits denying that the plaintiff as trustee of the lessee terminated the lease, and alleging, among other things, that the \$1800.00 which was deposited by the lessee with the lessor was deposited as security for performance of the terms and conditions in said lease; that the lessee broke the covenants and terms of said lease by failing to pay rent and failing to heat certain premises, which latter was provided for in the lease; that the actual damages sustained by reason of the failure on the part of the lessee to properly perform the terms and covenants of the lease "by way of lost rentals, ventilating expenses, lessee's in operating said theatre for a period of several months after November 12, 1914, in order to preserve the leasehold value of said theatre property, attorneys' fees, court costs and other expenses incurred in and about the enforcement of the rights" were in excess of \$1800.00.

On November 16, 1913, Simon and Simansky, the defendants, leased, in writing, to the Consolidated Motion Picture Company, for theatre purposes, the premises known as 4346 and 4348 West Madison street, Chicago. The term was from November 16, 1913, to November 14, 1922. The total rental was \$37,800.00, payable in monthly installments of \$350.00 in advance on the first day of each month. The following is a provision in the lease:

"Said party of the second part has deposited with said first parties contemporaneously with the execution of this instrument, the sum of Eighteen Hundred Dollars (\$1800.00), as security for the faithful performance by it of the covenants and agreements of this lease, and in the event all the covenants and agreements in this lease to be kept and performed by the party of the second part are promptly and faithfully kept and performed, then said sum of Eighteen Hundred Dollars (\$1800.00) shall be applied toward the payment of the rent due for the last five (5) months of the term of this demise and so far as the same will reach toward the payment of the rental of the month immediately preceding the last five (5) months of the term of this demise.

In the event of any breach of any of the covenants or contracts of this lease, then the said sum so deposited as security shall be and become the absolute property of the said first parties, and shall be retained by them as and for liquidated damages, it hereby being expressly stipulated and agreed by the said second party that inasmuch as the amount of damages which the said first parties will sustain by reason of the breach by it of any of the covenants of this lease cannot be ascertained, that the sum above set forth will be the least damages which the said first parties will sustain in the premises, and it is further understood and expressly agreed that nothing herein contained shall limit or be construed to limit the said first parties in any further or other claim for damages which they may sustain by reason of any breach or breaches of any of the covenants of this lease, and that the said first parties shall not be estopped in the event such sum of Eighteen Hundred Dollars (\$1800.00) is retained by them as aforesaid as liquidated damages to claim other and further damages by reason of any of the acts and doings of the said lessee herein."

It was further provided in the lease that the lessee should furnish heat for two stories in the building from October 1, to May 1, of each year, and that the lessor should pay the lessee \$175.00 a year therefor. The lessee deposited the sum of \$1800.00 with the lessor and went into possession of the premises and operated a theatre therein until about November 2nd or 4th, 1914 - the exact time is not shown - when it defaulted in the payment of the rent which became due on November 1, 1914.

On the evening of the 4th or 5th of November

1914, Simansky, one of the lessors went to the premises and found them dark and locked up. The next day the tenants of the two stores complaining of the want of heat, he put in some coal, got a new janitor and began to furnish heat. Simansky testified that he took actual possession about 14 days thereafter. Sometime between the 7th and 9th of November, 1914, - the exact time is not known - the lessors distrained for the rent; that suit went to a hearing and judgment for the lessors; nothing, however, was realized from the property levied upon, and ~~xxxxxxxxxxxxxxxxxxxx~~
~~xxxxxxxxxxxxxxxxxxxx~~ on the 2nd of December, 1914, the lessee went into bankruptcy.

On the 7th of December 1914, the defendant filed in the United States District Court in the bankruptcy proceedings, an affidavit in which he recited, among other things, the following: "By reason of which said default (meaning the abandonment of the premises by the lessee) this affiant together with the said co-lessor elected to and did terminate said lease on or about the 14th day of November, 1914, and did declare said sum of \$1800.00 forfeited as liquidated damages as in said lease provided, and took possession of said demise premises as he had a lawful right to do."

In the trial of the case the trial judge allowed the defendants, the lessors, as damages and in reduction of the plaintiff's claim for \$1800.00 the following items: \$36.00 for coal, \$14.00 for janitor, \$380.00 for November rent, \$200.00 for attorney's fees, \$15.50 for costs, \$35.00 for expense of resetting the entrance and \$100.00 for decorating. Judgment was entered for the difference being the sum of \$1044.50.

It is contended by the plaintiff that the \$1800.00 deposit was a penalty and not liquidated damages. With that contention we agree. Heber v. Moy, 183 Ill. App. 200; The Advance Amusement Co. v. Franke, 208 Ill. 579; Kay See Amusement Co. v. Gays, 177 Ill. App. 250; Miles v. Koslowski, 205 Ill. App. 285.

It is further contended that the statement of claim is defective in that the plaintiff failed to allege an acceptance of the lease. We are of the opinion that the allegations made therein were sufficient to justify the judgment that was actually entered. The cause of action was based on a termination of the lease. The evidence shows that the lessee fully performed until November 1, 1914; that immediately thereafter he abandoned the premises and by November 14, 1914, the defendants had taken possession; that a petition in bankruptcy by the lessee was filed in the District Court on December 2, 1914, and in an affidavit of December 7, 1914, made by one of the lessors and filed in the District Court in the bankruptcy proceeding, it was recited that he, together with his co-lessor, "elected to and did terminate said lease on or about the 14th day of November, 1914, and did declare said sum of \$1800.00 forfeited as liquidated damages as in said lease provided, and took possession of said demised premises as he had a lawful right to do." Under the circumstances, we are of the opinion that it is only reasonable to conclude from that evidence that the lease was terminated on the 14th day of November, 1914; and, as the petition in bankruptcy by the lessee was not filed until December 2, 1914, when the relationship of landlord and tenant, owing to the termination of the lease, had already ceased to exist, the trustee in bankruptcy could then have nothing to do with the acceptance or

It is further contended that the testimony of witness
is negative in that the defendant failed to appear in court
at the time. He was at the time that the defendant
was present was sufficient to testify that defendant had been
present. The issue of guilt was based on a finding
that the evidence shows that the issue fully
prevalent until November 1, 1914; that immediately thereafter
he abandoned the premises and by November 14, 1914, the defendant
had left possession; that a question in November 8,
the issue was taken in the second round on December 2,
1914, and in an affidavit of December 7, 1914, made by one
of the parties and filed in the district court in the same
month following, it was recited that he, defendant, with his
attorney, "advised to and did examine said issue as an
issue the 14th day of November, 1914, and did declare that
one of \$100.00 forfeited as liquidated damages on an issue
issue prevailing, and took possession of said damaged property
as he had a right to do." Under the circumstances, one
of the parties who is fairly represented by reciting from
that evidence that the issue was forfeited on the 14th day
of November, 1914, and, as the plaintiff in error has
the issue was not filed until November 8, 1914, when the
forfeiture of judgment and costs, which is the remaining
of the issue, had already caused to enter the record in

conclusionary would then have nothing to do with the reception of

rejection of the terminated lease, but did possess, as trustee in bankruptcy, the right, if any existed, to obtain, and, if necessary, sue for the deposit of \$1300.00. Reber v. Roy, supra.

We are of the opinion that considerable weight must be given to the declaration in the affidavit in the bankruptcy proceedings that the lease was terminated. It is true that it is the law that where a lease is determinable at the option of the lessor before the expiration of the term, a notice to terminate is generally necessary to evidence the exercise of such option. Where, however, as here, the lessee has abandoned the premises and the lessor has gone into possession and subsequently the lessee has become bankrupt, and in the bankruptcy proceedings the lessee under oath states that the lease has been terminated, it would not be reasonable in a suit by the trustee of the lessee for a deposit, as in this cause, to allow the lessor to stultify himself by claiming as a defense that the lease was not terminated.

It may be that some of the amounts which were allowed by the trial court as damages sustained by the defendants should not have been allowed, but as the record stands no objection is made thereto on behalf of the plaintiff.

As to the claim by the defendants that they should be allowed as damages an amount paid for broker's fees in securing a new tenant and the amount of the prospective loss of rent under the new lease; we are of the opinion that occurring, as they did, after the termination of the lease, they cannot

now be set up as damages on the part of the lessor. The employment of the broker and the making of the second lease occurred after the termination of the original lease, and there was no error on the part of the trial court in refusing to allow either the broker's fees or the difference in the amount of the rent as damages.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

172 - 24093

LAWRENCE ICE CREAM COMPANY,
a corporation.

Appellee.

vs.

S. G. HOUSTON, doing business
as S. G. Houston & Son,

Appellant.

213 I.A. 664

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

A motor truck belonging to the plaintiff having been struck and damaged by a motor truck belonging to defendant, the plaintiff brought suit and recovered a judgment in the trial court without a jury in the sum of \$567.97 and costs. From that judgment this appeal is taken.

Plaintiff's amended statement of claim alleges that plaintiff's servant was driving an automobile truck east on Oak street where it crosses La Salle street and was exercising due care and caution for the safety of its property; that defendant's servant was driving a motor truck along La Salle street in a northerly direction at such a dangerous rate of speed that it drove into and collided with plaintiff's truck and damaged it so that plaintiff had to pay out \$161.70 for repairs; that the further sum of \$455.85 was paid by plaintiff for eighteen days hire of a truck in place of the one damaged while it was being repaired.

The defendant in its affidavit of merits makes specific denial of plaintiff's allegations and alleges that

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... and damaged by a motor truck belonging to the ... the plaintiff brought suit and recovered a judgment ... in the trial court without a jury in the sum of \$250.00 ... order. When that judgment was affirmed by the ...

... defendant's amended statement of claim alleges that ... defendant was driving an automobile from east to ... street where it crossed La Salle street and was ... the car and collision for the purpose of its purpose; ... defendant's account was driving a motor truck along ... La Salle street in a westerly direction at such a moderate ... of speed that it drove into and collided with plaintiff's ... truck which was at that plaintiff was to pay out \$250.00 ... for repairs; that the further sum of \$250.00 was paid by ... for the plaintiff's loss of a truck in place of the one ... damaged which it was being transported.

The amount for plaintiff's claim is ...

plaintiff was driving its automobile truck at a dangerous rate of speed in a negligent and careless manner and thereby caused the accident. It was stipulated by the parties that the actual damages sustained, exclusive of damages for loss of use of the truck while being repaired, amounted to the sum of \$172.12.

Plaintiff's driver, McCole, on the morning of July 21, 1917, was going east on Oak street, driving the plaintiff's heavily loaded five ten automobile truck, at a speed, according to McCole's testimony, of about 3 or 4 miles an hour. When he reached the intersection of La Salle street he says he stopped and looked both ways and saw nothing to hinder him from crossing; that Nelson, a helper riding with him, called his attention to defendant's truck about a block away (Nelson puts it at half a block) approaching at about 10 miles an hour and increasing its speed to 15 or 16 miles an hour as it got closer to Oak street. It is not denied that when he had crossed the intersection and the forward half of his truck was east of the (La Salle) sidewalk line, defendant's truck struck it with such force that Nelson was thrown from his seat so that he fell between the wheel and the footboard. La Salle street is about 30 or 35 feet wide at that point. The testimony of defendant's driver agrees with the foregoing excepting in two particulars. He said plaintiff's truck was going 6 or 7 miles an hour and that he slackened his speed as he approached Oak street. He also testified that his car could not go faster than 16 miles an hour on account of its mechanical governor;

It is the policy of the United States to support the efforts of the people of the Western Hemisphere to achieve their own economic and social development, and to the extent possible, to assist them in this process. The United States is committed to the principle of self-determination, and to the principle of the right of the people of the Western Hemisphere to choose their own form of government and to determine their own economic and social policies. The United States is committed to the principle of the right of the people of the Western Hemisphere to the free and peaceful use of the seas and the air, and to the principle of the right of the people of the Western Hemisphere to the free and peaceful use of the land and the water. The United States is committed to the principle of the right of the people of the Western Hemisphere to the free and peaceful use of the sun and the moon, and to the principle of the right of the people of the Western Hemisphere to the free and peaceful use of the stars and the planets.

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that he first saw the plaintiff's truck when he was about 25 feet away from it; that he turned east and tried to get around the corner with them to avoid a collision, and applied the brake, but the street (La Salle) having been recently sprinkled the "car skidded and went into them."

Nelson, who was on plaintiff's truck, testified that they were going about 4 or 5 miles an hour and defendant's truck when it reached Oak street, about 20 or 25 miles an hour; that plaintiff's truck was "about clear" of La Salle street when it was struck. The only other witness gave testimony of such a contradictory nature that it is unreliable.

The evidence shows that as a result of the collision the frame of plaintiff's truck, made of high grade steel, was bent out of line one and a half to two inches; that the rear engine leg was broken and the radiators locked. Plaintiff was deprived of the use of its truck and found it necessary to hire another while repairs were being made. The finding of the trial court on the amount paid out by plaintiff for hiring another truck not being questioned by defendant's counsel in his brief, it is therefore assumed to be correct. It is argued by counsel that plaintiff's driver was guilty of contributory negligence. He does not make it very clear but seems to urge that the 5 ton truck 23 feet long, going slowly and heavily loaded with ice boxes, should have stopped on the way across before it reached the east side of La Salle street in order to let the fast approaching lighter machine pass safely. The evidence fails to support that view. When the defendant's truck was first seen by plaintiff's driver it was at least half a block away, giving him plenty of time to stop. Had he stopped, as counsel seems to

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suggest, in the middle of the street, there would not have been room for defendant to pass safely on either side. While crossing he became aware of the increased speed of defendant's truck and putting on more power steered toward northward and east to get out of his way, and nearly succeeded for he had almost "cleared" the east sidewalk when his machine was struck in the transmission by that of defendant.

The evidence tends to show that while defendant's truck was not exceeding the legal rate of speed, yet it was probably going faster than ten miles an hour. Aside from the testimony of plaintiff's witnesses, the force of the blow from a light truck that after skidding 23 feet bent the chassis and broke the transmission of plaintiff's machine would seem to indicate a greater speed than defendant's driver admits in his testimony.

It is urged by defendant that when he saw the imminent danger of plaintiff and applied the brake, unintentionally causing his machine to skid on the wet street into plaintiff's, he only did what any reasonable man would do under the circumstances and is therefore not chargeable with negligence. As we see the evidence before us we are inclined to the opinion that defendant's negligence started before his machine skidded. It is the duty of every driver to look out for any vehicle that might come from any of the cross streets ahead of him, yet defendant's driver claims he failed to see plaintiff's big 5 ton truck until within 25 feet of it. When the vehicle on the intersection is heavily loaded and the approaching vehicle is lighter it is the duty of the driver of the latter to keep his machine under such control

...in the middle of the street, where would not have
...for that matter to have walked on either side. This
...at the intersection of the street and the sidewalk
...the sidewalk on both sides of the street. The
...to go out of the way, and usually succeeded in
...the case of the sidewalk where the machine was
...in the intersection of the street and sidewalk.

The witness looks to him that this sidewalk
...the sidewalk on both sides of the street, and it was
...being faster than the other, and it was
...the sidewalk's witness, and the corner of the
...the sidewalk where the machine was
...the sidewalk and across the street and sidewalk's witness
...to indicate a faster speed than the sidewalk's witness
...in the sidewalk.

It is noted by defendant that when he saw the car
about danger of plaintiff and asked the driver, unintentionally
the meaning of this motion to him on the way about into plaintiff
1977, he only did what any reasonable man would do under
the circumstances and is therefore not chargeable with negligence.
Again, as we see the evidence before us we are inclined to
the opinion that defendant's negligence occurred before his
vehicle entered. It is the duty of every driver to look
out for any vehicle that on the same road as the driver
is about to him, yet defendant's driver claims he failed
to see plaintiff's car in time to avoid collision on 10th of 1977.
When the vehicle on the intersection is heavily loaded and
the approaching vehicle is lighter it is the duty of the
driver of the latter to keep his headlights on and to warn the other

as not to collide with another which is exercising ordinary care in crossing in front. The first to reach a crossing ordinarily has the right of way. Chicago & Alton R. R. Co. v. The Rockford, Rock Island & St. Louis R. R. Co., 72 Ill. 34. Plaintiff's driver continuing over the crossing before defendant had reached it and in plain view, was not guilty of contributory negligence and we are of the opinion, therefore, that under the circumstances, the injuries complained of may be properly attributed to the negligent driving of the defendant's truck. Babbitt on Law Applied to Motor Vehicles, 2nd Ed., Sec. 382; Rupp v. Keebler, 175 Ill. App. 619.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

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193 - 24115

CLARENCE HOYLE, a corporation,

Appellee.

vs.

WILLIAM F. KRENNER,

Appellant.

213 I.A. 664

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action on a promissory note for \$1000.00 signed by the defendant and drawn to the order of Clarence Hoyle and by him endorsed to the plaintiff. The affidavit of merits stated that the note in question was given to the payee, one of the officers of the plaintiff corporation, without consideration or any value received by the defendant and solely for the accommodation of the plaintiff. This was the only issue presented to the trial court, which heard the case without a jury. This is an appeal by the defendant from a judgment for the plaintiff for the amount of the note.

The note read "value received". The evidence showed that there had been a long series of transactions between these parties involving the purchase and sale of lumber. The plaintiff would sell a quantity of lumber to the defendant who, in many instances, would give a note therefor, and it often happened that when the note fell due, the defendant would pay only a portion of it. It was the habit of the plaintiff to discount these notes



at the bank as they were received and when the defendant was able to meet only a portion of the note at maturity the plaintiff would give defendant a check for the balance, so as to enable him to take up the note in full, whereupon the defendant would give plaintiff a new note for a given period, to cover the amount of the check plaintiff had given him to enable him to meet the old note, with interest thereon for the period of the new note, and also to cover some part of the amount then owing from defendant to plaintiff on open account. Such was the note involved here. The defendant had given plaintiff a note for \$800 which was to fall due October 23, 1916. The plaintiff had discounted this note at the bank. Shortly before the maturity of this note the defendant advised plaintiff that he would be able to pay only \$200 on this note when it matured. Consequently on October 21, 1916, the plaintiff gave defendant a check for \$600 to make it possible for him to take up his note for \$800 on the 23rd and then the note in suit was executed by the defendant, for \$1009.00, due ninety days after date, to cover the amount of the check, \$600.00, with interest at 6 per cent on that amount for the period of the new note, \$0.00 and \$400.00 to apply on the open account. There was some conflict in the testimony on these matters but the evidence was such as to warrant a finding by the court that the facts were as we have set forth, above. There was considerable evidence on the question of the open account, as to whether it showed a balance in favor of the plaintiff at this time. The trial court found that the open account showed a balance due the plaintiff from the defendant at the time the note in suit was given and we cannot say from the record that the evidence was not such as to support

At the time the first report was received from the
 the office is made only a portion of the case is made up
 The plaintiff would give defendant a check for the balance
 and, so as to enable him to take up the balance in full.
 defendant in the meantime would give plaintiff a new note
 for a given period, to cover the amount of the check given.
 All this would be to enable him to meet the old note, with
 interest thereon for the period of the new note, and also to
 cover the part of the amount then being then due to him in
 relation to open account. Thus the whole involved sum
 the defendant, and given plaintiff a note for that sum and
 to all the money he, plaintiff, had advanced to the
 defendant at the time. What the defendant is entitled to take
 from the defendant is plaintiff's debt to him in regard to this
 in the sum of \$500 on that note which is returned. Consequently
 he is left with \$500, the plaintiff gave defendant a check
 for that sum to make it possible for him to take up his note.
 The sum on the old note and then the sum on the new note
 of the defendant, the \$500, the plaintiff gave him when
 he gave the amount of the check, \$500, of the plaintiff
 at the end of that period for the sum of \$500, the
 \$500 and \$500 to apply on the open account. Then the
 sum applied in the settlement on their account but the
 sum was then to be returned to plaintiff by the defendant and
 there was no more to be paid, except, of course, there was
 also evidence on the part of the open account, as to
 whether he showed a balance in favor of the plaintiff at
 this time. The sum, then, would be the balance
 showed a balance due the plaintiff from the defendant at
 the time the note in full was given and he would pay from
 the record that the evidence was not such as to support

that finding. But in our view of the case this is not material. The evidence shows that for some time the defendant had been buying lumber from the plaintiff and in paying for that lumber, this series of notes was given. The fact that plaintiff discounted them as they were received, did not make them accommodation notes. If there was any consideration for the notes they were not accommodation notes. Part of the consideration for the note in suit was the \$600 check given to the defendant by the plaintiff to enable him to take up the \$800 note. There is nothing in the record to show that the \$800 note was an accommodation note. Defendant's contention that it was, and that plaintiff owed him \$800 on the note and that the \$600 check was a payment on account is disproved by the fact that in the new note given at that time, being the one in suit, there was included interest on the \$600 for 90 days, the period of the new note. The evidence shows that this was done in all instances when new notes were given to cover expiring notes and such amounts as plaintiff was paying defendant to enable him to take them up. If these were accommodation notes and the payments by plaintiff were payments of money due defendant, the latter would have had no occasion to include interest on these payments in the new notes given. That these notes were not for accommodation is further shown by the fact that on several occasions when the defendant failed to meet the notes at maturity, and the plaintiff took them up, the defendant would later reimburse the plaintiff, paying the amount the plaintiff had paid in taking up the note, including interest.

The defendant filed no claim for set-off in this

Q. Now, when you say that the defendant is the one who is responsible for the loss of the money, are you saying that the defendant is the one who is responsible for the loss of the money?

case nor did he raise any issue of a failure of consideration. The sole defense presented by the affidavit of merits was that there was no consideration for the note here sued upon, but that it was given purely for plaintiff's accommodation. On that issue, in our opinion, the evidence is to the contrary and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

202 - 24134

ROMA SCHAFFER,

Appellant,

vs.

FORT DRABORN TRUST AND
SAVINGS BANK, administrator
of the estate of ALBERT SCHAFFER,
Deceased, et al.

Appellees.

213 I.A. 665

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

The complainant, Roma Schaffer, filed this bill in the Superior Court of Cock County, seeking to have a decree of divorce which she had procured against her husband, in the Circuit Court, set aside on the ground of fraud and praying further that she be declared the sole heir of her husband, who had since died, and that the administrator of his estate, and his brothers and sisters, all of whom were made defendants, be required to account for such of his property as might be found to be in their possession. After hearing the evidence, the trial court entered a decree dismissing the bill for want of equity, from which the complainant has appealed.

The evidence shows that the complainant and her husband had frequent quarrels while they were living together and that she finally retained a lawyer and filed a bill in the Circuit Court, praying for a divorce on the ground of adultery; that there was a hearing on this bill

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which the husband did not contest, although he had filed his appearance and answer in the case, after which the court indicated that he would enter the decree as prayed for and directed that the evidence be written up. After the hearing, the complainant returned to the home of her parents where she was living and told her father that the case had been heard and that she was going to get her decree. Later, on the same day, the complainant's husband came to her parent's home and had a talk with her, after which they both talked with members of her family saying that they had become reconciled and that there would be no divorce. This was on August 11, 1916. The husband stated "that he would see the lawyers the following morning and instruct them to cancel the proceedings as far as he could, so as to put it out of court, or something to that effect", as the complainant's father testified. It appears, however, that the decree of divorce was entered on the following day. Subsequent to this time the parties lived together as husband and wife. The complainant never conferred with her lawyer about the case further, nor made any inquiry of him as to its status, although she, at least on one occasion, saw him and had opportunity to do so.

The husband died May 9, 1917 and a few weeks later, the lawyer who had represented her in her divorce action told her of the entering of the decree of divorce. This lawyer testified that he knew of the co-habitation of Schaffer and the complainant, following the entering of the decree, and spoke to him about it and told him it was "very bad business" and that Schaffer replied that he knew his own business. He also testified that Schaffer told him on

several occasions that Mrs. Schaffer and her family "had it in for me for some reason, and that I therefore should not communicate with them in any way, or have anything to do with them."

In contending that the trial court erred in dismissing the bill, counsel for complainant urge that when a promise is made by a litigant or his attorney, the other party has a right to rely on that promise being carried out, and does not have to take any steps to see that it is carried out, citing a number of cases to that effect, where a judgment or decree procured by a party without notice, after he has promised to discontinue or dismiss the action or suit he has brought, has been set aside. That, however, is not the situation here, as a reading of the facts, as we have set them forth above will clearly demonstrate. The husband made no agreement to discontinue any action he had brought. The wife had filed the bill and she alone could dismiss it or discontinue the proceedings.

In further support of this appeal counsel urge that it is the policy of the courts to continue the marriage relationship of a husband and wife, especially if the one who is entitled to have it severed, wishes it continued. This is true, but it can have no bearing here. It is no longer possible for this husband and wife to continue as such. He is dead and at most, if the divorce decree is set aside, she will become his widow.

In our opinion the decree must be affirmed. A decree or judgment will not be set aside on the ground of fraud unless the fraud alleged has been proven by clear and

satisfactory evidence. McKenna v. Nickelberry, 242 Ill. 117, 134. There is no proof in the record that the complainant did not know that the decree of divorce had not been entered. She is hardly in a position to urge that she had a right to rely upon her husband's promise to have the case discontinued. She had just been in court and submitted proof satisfactory to the court to the effect that he had broken his most solemn marriage vow and had been guilty of adultery. She was negligent in failing to see her own lawyer and direct that the suit be dismissed. It was her case and she alone could discontinue it. Further, there is no proof in the record that the fraud complained of, was the thing that brought about the entering of the decree, or that anything whatever was done by the husband to produce that result. There is no contention here that the adultery, on the basis of which the divorce decree was entered, had not taken place or that the charges to that effect were untrue. While a court of equity may set aside a decree obtained by fraud, to justify such action, it must be made clearly to appear, that the decree so sought to be set aside, has no other foundation than the fraud complained of. Glosson v. Glosson, 192 Ill. App. 259. These reasons would be pertinent if the object of this bill was to restore the marriage relationship. But that cannot be the object sought to be attained by the complainant for death has intervened and prevented such a result. They are especially pertinent when the bill has for its object that complainant may be restored to her statutory rights in the property her husband left. While the facts involved in Gallery v. Gallery, 166 Ill. App. 417, are not these

1. The first question is whether the defendant is entitled to a new trial. The court finds that the defendant is not entitled to a new trial because the evidence is sufficient to support the verdict.

2. The second question is whether the defendant is entitled to a judgment of acquittal. The court finds that the defendant is not entitled to a judgment of acquittal because the evidence is sufficient to support the verdict.

3. The third question is whether the defendant is entitled to a judgment of conviction. The court finds that the defendant is entitled to a judgment of conviction because the evidence is sufficient to support the verdict.

4. The fourth question is whether the defendant is entitled to a judgment of conviction. The court finds that the defendant is entitled to a judgment of conviction because the evidence is sufficient to support the verdict.

5. The fifth question is whether the defendant is entitled to a judgment of conviction. The court finds that the defendant is entitled to a judgment of conviction because the evidence is sufficient to support the verdict.

6. The sixth question is whether the defendant is entitled to a judgment of conviction. The court finds that the defendant is entitled to a judgment of conviction because the evidence is sufficient to support the verdict.

7. The seventh question is whether the defendant is entitled to a judgment of conviction. The court finds that the defendant is entitled to a judgment of conviction because the evidence is sufficient to support the verdict.

8. The eighth question is whether the defendant is entitled to a judgment of conviction. The court finds that the defendant is entitled to a judgment of conviction because the evidence is sufficient to support the verdict.

9. The ninth question is whether the defendant is entitled to a judgment of conviction. The court finds that the defendant is entitled to a judgment of conviction because the evidence is sufficient to support the verdict.

10. The tenth question is whether the defendant is entitled to a judgment of conviction. The court finds that the defendant is entitled to a judgment of conviction because the evidence is sufficient to support the verdict.

-5-

involved here, such that is said in that decision is applicable here.

For the reasons given the decree of the Superior Court is affirmed.

AFFIRMED.

It is requested that the attached copy be sent to the

proper authorities.

Very respectfully,
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Very respectfully,
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210 - 24134

CITY OF CHICAGO.

Appellee,

vs.

JIM YARBROUGH,

Appellant.

213 I.A. 665

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a quasi-criminal action in the Municipal Court of Chicago, based upon an alleged violation of an ordinance of the City of Chicago.

The complainant charged that the defendant, on the 14th day of November, A. D. 1917, "did then and there make an indecent exposure of his person in a public place, in front of and in view of certain female persons, in violation of section 2025 of the Revised Municipal Code of Chicago." A jury was waived and after hearing the evidence, the trial court found the defendant "guilty of a violation of the ordinance described in the complaint herein", and assessed a fine of \$100 and costs. Within a proper time, motions were made by the defendant to vacate the judgment, for a new trial and in arrest of judgment, which were successively overruled by the court.

On this appeal, the defendant urges that the court erred in overruling these motions and also in finding him guilty of the violation of an ordinance which had previously

2131.A. 662



The following is a summary of the information received from the various sources mentioned in the report. It is to be understood that the information is not necessarily complete, and that the facts are not necessarily in the order in which they are presented. The information is presented in the order in which it was received.

The first source mentioned is the [illegible] of the [illegible] at [illegible]. This source has provided the following information: [illegible]

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The twentieth source mentioned is the [illegible] of the [illegible] at [illegible]. This source has provided the following information: [illegible]

been repealed.

The only bill of exceptions in the record consists of a stenographic report of the proceedings had in connection with the making of the motions referred to above, by the defendant, and the rulings of the court thereon, which is sufficient for the purposes of this appeal.

On the argument of the motions referred to, in the trial court, it was shown that "Sec. 2025 of the Revised Municipal Code of Chicago," when in force, was a section providing for the licensing of so-called "runners" and prescribing a penalty or fine to be imposed on any person acting as a runner, without procuring a license, or in violation of the terms of that section, but it was alleged by counsel representing the plaintiff that this section, as well as the entire Revised Municipal Code of Chicago, had been repealed in 1911, some years before this alleged offense was committed and this proceeding instituted, and that this case had been brought under Sec. 2025 of the Chicago Code of 1911 which was then and still is in effect and which prescribes a penalty or fine for indecent exposure.

The judgment of the trial court was that the defendant was "guilty of a violation of the ordinance described in the complaint herein." The only ordinance described in the complaint was "Sec. 2025 of the Revised Municipal Code of Chicago," an ordinance which it is admitted had long since been repealed and was no longer in force. The judgment was therefore void.

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It will not be necessary to pass upon the other errors alleged. For the reason stated the judgment of the Municipal Court is reversed.

REVERSED.

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FLORENCE R. PECK,
Appellee,

vs.

ROBERT B. PECK et al.,
(Defendants)

ROBERT B. PECK,
Appellant.

(294a)
213 I.A. 665

INTERLOCUTORY APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Robert B. Peck, defendant to a bill for separate maintenance, from an interlocutory order of the Circuit Court granting an injunction restraining him from disposing of any of his property, restraining the Bowman Dairy Company, in which appellant owns shares of its capital stock, from transferring on its books any of said shares and from paying to appellant any dividends thereon, and restraining certain named safety deposit companies wherein appellant is alleged to have deposited moneys, securities and various choses in action, from paying over or delivering to appellant any of such property.

The verified bill of complaint, which was filed October 31, 1918, alleges that complainant is and for more than six years last past has been an actual resident of this state; that in May, 1912, she was married at Wilmington, Delaware, to appellant and lived and cohabited with him as his wife until September 20, 1918, when, with their two children, she was compelled to separate from him; that although complainant conducted herself as a true, chaste and faithful wife, appellant commenced the excessive use of intoxicating liquors

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

SEP 11 1935

TO THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

FROM THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

RE: [illegible]

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shortly after said marriage and for more than two years last past has been guilty of habitual drunkenness, whereby he has become unfitted to associate with or to attend to any business during that period; that while intoxicated he is quarrelsome, ill treats his family and uses approbrious epithets, rendering appellee's condition unbearable and her life burdensome, in consequence whereof she is compelled to live separate and apart from him without her fault.

The bill further alleges that appellant is the owner in fee simple of real estate in Cook County worth \$10,000, and owns personal property worth \$250,000; that he has an annual income from said real and personal property of at least \$25,000; that he has no business or occupation but lives upon his income, the whole of which he has spent during the past two years; that appellant's personal property consists of corporate bonds and stocks, notes secured by real estate mortgage, cash in bank, including 800 shares of the capital stock of the Bowman Dairy Company of the par value of \$80,000; that said securities are in the vaults of the Chicago Safe Deposit Company or some other safety deposit vault in Chicago, and that some of said bonds are held by the Illinois Trust & Savings Bank as collateral security for a loan made to appellant, who also has money on deposit at said bank subject to check.

It is further alleged that appellee is without means of subsistence, has no property or income of her own and is entirely dependent upon appellant for her support and that of her children; that appellant, because of his manner of living, is incapable and unfit to have the management of his property or income therefrom, and unless restrained by injunction will squander and dissipate all of said property and

leave appellee and said children without any means of support; that appellant has threatened, and appellee fears that he might carry his threat into execution, to remove said personal property from said depositories and to sell and dispose of the same and to leave the State of Illinois and abandon appellee and her said children; that "the rights of your oratrix will be unduly prejudiced if an injunction, as hereinafter prayed, is not immediately issued and without notice to the defendants."

After praying for answer, custody of the children, suit money and support money, appellee prays that appellant may be enjoined from encumbering or disposing of his property; that the Bowman Dairy Company be enjoined from transferring appellant's stock on its books and from paying to appellant any dividends thereon; that any bank or safety deposit company in Cook County which may have in its possession or under its control any securities belonging to appellant or in which he is interested, be enjoined from paying or delivering the same to appellant. In the verification it is stated that appellee "is advised and informed and so states the fact to be that her rights will be unduly prejudiced if the injunction is not issued immediately and without notice to the defendants." On the same day the court ordered that the injunction issue.

Two principal grounds for reversal are urged, viz, that the affidavit of complainant does not fulfill the condition of the statute upon which the authority to issue an injunction without notice is limited; and that the scope of the injunction is too broad. The first of these is in our opinion sufficient
 and
 to attain the desired.

The statute applicable in such cases (chap. 69, sec. 3) forbids the issuance of an injunction without notice unless it shall appear from the bill or affidavit accompanying the same that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately and without such notice. A careful inspection of the bill and affidavit herein does not convince us that the showing thus presented warranted the conclusion of the chancellor that the issuance of the injunction as ordered was necessary to insure the protection of complainant's rights. The mere statement that appellant had threatened to do the things asserted, with no specific mention of the language employed or the time when the alleged utterances were made, and the expression of fear on the part of complainant that the threat charged might be executed and her rights prejudiced, is not, we think, a showing such as is contemplated by the statute. It has been held that statements of like tenor were vague and indefinite or but conclusions. General Gas Co. v. Stuart, 69 Ill. App. 560; Suburban Construction Co. v. Maugle, 70 Ill. App. 394, 398. As said by our Supreme Court in Christian Hospital v. The People, 223 Ill. 244:

"It is the court, judge or master to whom it must appear, from the facts stated in the bill and affidavit, that the rights of complainant will be unduly prejudiced, and not the complainant himself. The facts from which the inference arises are to be stated, and as the affidavit in this case stated nothing but the opinion of the complainant, it was not sufficient to make it appear to the court that he would be prejudiced in any manner."

The nature of the showing in the instant case could not be said to have been materially different from that made in the case last referred to.

The statute applicable in such cases (Comp. 60,
100) forbids the issuance of an injunction without notice
unless it shall appear from the bill or affidavit accompanying
the same that the rights of the complainant will be unduly
infringed if the injunction is not issued immediately and
without delay. A careful inspection of the bill and af-
fidavit submitted here does not convince me that the showing thus
made entitles the complainant to the conclusion of the chancellor that the
injunction is warranted. The bill and affidavit do not show
the necessity of the complainant's rights. The mere statement
that the complainant had threatened to do the things asserted, with-
out any mention of the language employed or the time when
the alleged statements were made, and the expression of fear
on the part of complainant that the threat charged might be
executed, and her rights prejudiced, is not, in my opinion, a showing
that the injunction is warranted. It has been held that
statements of like tenor were vague and inadmissible on an applica-
tion for an injunction. See Ex parte, 88 Ill. App. 600; Ex parte,
Ex parte, 70 Ill. App. 304, 305, 306, 307, 308, 309, 310, 311.
The Illinois Court in Ex parte Ex parte, 70 Ill. App. 304, 305, 306, 307, 308, 309, 310, 311.
It is the court, judge or master to whom it may
appear, that the facts stated in the bill and affidavit, and
the rights of complainant will be unduly prejudiced, and that
the complainant himself. The facts from which the inference
may be drawn, and as the evidence in this case
shows, nothing but the opinion of the complainant, it was
not sufficient to make it appear to the court that he would
be prejudiced in any manner.

The nature of the showing in the instant case does not so
show that the complainant is entitled to an injunction in the case here
submitted.

Applicable to what we are considering is the language of this court in the recent opinion in Davis v. Rose, 208 Ill. App. 329:

"The order of injunction was granted without notice. This alone is sufficient reason for a reversal. Notice is mandatory under the statute except where from the bill and affidavit it appears 'that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice.' No such facts appear. The bill alleges only a disposition on the part of the defendant to default in performance of the contract with complainant and an intention to deal with other parties. The affidavit asserts only a conclusion that complainant's rights would be prejudiced. It has been held frequently that to justify the issuance of an injunction without notice it is not sufficient to state conclusions of prejudice, but facts must be stated from which the court can draw the conclusion that an immediate injunction without notice is necessary to save complainant from harm. The injunction was improperly ordered."

The position of appellee that appellant's right to a review by this court of the order in question was waived because application was not first made to the trial court to have the injunction modified, is not well taken, as will clearly appear from a reading of the provisions of the statute covering appeals of this character (sec. 123, chap. 116).

In accordance with the above rulings and for the reasons given the order granting the injunction is reversed.

REVERSED.

ALBERT E. COOK,
Appellant,

vs.

SMITH FORM-A-TRUCK COMPANY,
a corporation,
Appellee.

213 I.A. 665

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this appeal, the complainant, Albert E. Cook, seeks a reversal of a decree dismissing for want of equity his bill for specific performance of a certain alleged contract with the defendant, and canceling the said purported contract.

The bill of complaint set forth, among other things, that the complainant was the owner of letters patent for a "Tractor Attachment for Automobiles," etc.

That on the 29th day of September, 1916, he entered into a contract with the defendant, the Smith Form-a-Truck Company, a corporation, whereby the latter was given the right to manufacture and sell the aforesaid tractor attachment.

That by the terms of said contract, defendant was to pay complainant the sum of one thousand dollars (\$1,000.00) upon its execution, which said sum has never been paid.

That the defendant also agreed, by the terms of the said contract, to pay a certain sum therein mentioned, as royalty on each device so manufactured, and to keep a correct account of the number of devices sold, to enable the complainant to ascertain the amount of royalties due him from the defendant.

That defendant also agreed to permanently affix to each tractor attachment so manufactured and sold, a license plate or label designed and furnished by the complainant, and failing therein, was to pay complainant the sum of one hundred

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AMOUNT FROM

DEPOSIT COURT

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dollars (\$100.00) for each device manufactured and sold in violation of this provision.

That defendant was actually engaged in the manufacture and sale of the said tractor attachment covered by complainant's said letters patent.

That complainant has requested defendant to make payment of the aforesaid sum of one thousand dollars (\$1,000.00) and of the royalties due and accruing under the said contract, which defendant has refused and still refuses to comply with; and that defendant refuses to permit complainant to examine its books and accounts for the purpose of determining the sums due him under the said agreement.

That defendant has wholly disavowed the said contract and completely ignored its obligations thereunder, refusing to be bound by any of its terms whatsoever.

That defendant is wholly unable to respond in damages, for reasons therein set forth.

The bill prayed that defendant be ordered to specifically perform its said agreement by placing the said license plates on all tractor attachments manufactured and sold by it, as agreed, or be restrained from the further manufacture and sale of the said attachment; and that a receiver be appointed to take charge of the books and accounts of the defendant company, to determine the amounts due complainant, etc.

Defendant filed answer thereto, setting forth, among other things, that the officer who signed said purported agreement on behalf of defendant company (E. I. Rosenfeld) was without authority to do so; and that his said act in so signing the purported agreement was never ratified by the defendant company.

That the complainant was not the owner of any letters patent as described in the bill of complaint; and that it was

... (\$100.00) for each device manufactured and sold in violation of this provision.

That defendant was not only engaged in the manufacture and sale of the said tractor attachment covered by complainant's said patent.

That complainant has requested defendant to make payment of the statutory sum of one thousand dollars (\$1,000.00) and of the royalties due and accruing under the said contract, which defendant has refused and will refuse to comply with; and that complainant's refusal to permit defendant to examine the books and accounts for the purpose of determining the same has been the cause of this lawsuit.

That defendant has wholly disavowed the said contract and completely ignored the obligations thereunder, refusing to be bound by any of its terms whatsoever. That defendant is wholly unable to respond in damages.

THE VERDICT SHALL BE THAT

THE BILL prayed for, defendant be ordered to specifically perform the said agreement by placing the said license plates on all tractors attachments manufactured and sold by it, as stated; and be restricted from the further manufacture and sale of the said attachments; and that a receiver be appointed to take charge of the books and accounts of the defendant company, to determine the amounts due complainant, etc.

Defendant filed answer denying, setting forth many defenses, that the officer who signed said purported assignment, that the officer of defendant company (E. I. Rosenfeld) was not authorized to do so; and that his name was not on the purported assignment and never ratified by the defendant.

That the complainant was not the owner of any interest in the said assignment, and that it was

not engaged in the manufacture or sale of a tractor attachment on which complainant owned the patent right.

That prior to the execution of the said purported contract complainant falsely and fraudulently represented that it was upon the same terms and conditions as a license agreement entered into with a corporation known as the Redden Motor Truck Company, except that the license granted to the Redden Company was an exclusive one, while that granted to the defendant was not exclusive.

That the defendant had no knowledge of the said Redden Company's license agreement except what it received from complainant, upon which it relied, prior to the time the said Rosenfeld signed the purported agreement.

That the said purported license agreement was in truth and in fact not upon the same terms and conditions as the one granted to the Redden Company, but differed therefrom in several important particulars, among them being that the minimum monthly guaranteed royalties required to be paid by the said Redden Company was only five hundred dollars (\$500.00) per month for a period of six months from the date of the execution thereof and \$1000 per month thereafter, while the one signed by Rosenfeld called for a minimum payment of one thousand dollars (\$1000.00) per month from the date of the alleged agreement.

That substantially contemporaneous with the signing by the said Rosenfeld of the purported agreement, complainant entered into a separate agreement with the Redden Company, whereby the latter was to share in the profits to be derived from the purported agreement with the defendant; that the Redden Company was a competitor of the defendant, and that by reason of the premises it was given an undue advantage over the defendant.

that the defendant owned the patent right.

That prior to the execution of the said purported

agreement the defendant represented that

it was upon the same terms and conditions as a license agree-

ment entered into with a corporation known as the Redden Motor

Travel Company, except that the license granted to the Redden

Company was an exclusive one, while that granted to the defend-

ant was not exclusive.

That the defendant had knowledge of the said

license agreement except what it received from

the defendant, upon which it relied, prior to the time the said

agreement was signed.

That the said purported license agreement was in

fact and in fact not upon the same terms and conditions as the

one granted to the Redden Company, but differed therefrom in

several important particulars, among them being that the minimum

monthly guaranteed royalties required to be paid by the said

Redden Company was only five hundred dollars (\$500.00) per month

for a period of six months from the date of the execution thereof

and \$1000 per month thereafter, while the one signed by Rosenfeld

called for a minimum payment of one thousand dollars (\$1000.00)

per month from the date of the alleged agreement.

That substantially contemporaneous with the signing

by the said Rosenfeld of the purported agreement, complaint

was filed in a separate agreement with the Redden Company.

That the latter was to share in the profits to be derived from

the purported agreement with the defendant, that the Redden

Company was a competitor of the defendant, and that by reason

of the premises it was given an undue advantage over the de-

endant.

That prior to the purported execution of the alleged agreement, complainant and the Redden Company commenced an action against defendant in the United States District Court, wherein it was claimed that the manufacture and sale of said tractor attachment by defendant was an infringement of complainant's letters patent therein described.

That after the execution of said purported agreement, the said suit so commenced by complainant and the Redden Company was not dismissed, but was still being actively prosecuted by the parties complainant thereto, and was still pending at the time of the filing of defendant's answer herein.

Subsequently to the filing of defendant's answer it filed a cross-bill against complainant, wherein it set forth facts which it claims showed that the aforesaid purported agreement was in fact a nullity.

The cross-bill prayed that the said purported contract be declared null and void and of no effect, and that it be canceled; and that the complainant be restrained from further interfering in any way with the business of the defendant.

The said Redden Company was not made a party defendant to the said cross-bill, although it appears that it was the exclusive licensee of the patent in question.

Without directly passing upon the question, it may be assumed for the purpose of this opinion, that the said purported contract was properly executed by the parties thereto. However, it is a well settled rule that a court of equity will not decree the specific performance of a contract unless it was entered into with perfect fairness and without misrepresentation or oppression. Leonard v. Crane, 147 Ill. 52.

It appears from the testimony of the complainant himself that in the course of the negotiations preceding the execution of the said purported contract by the said Rosenfeld

... prior to the purported execution of the alleged
complaint and the Hedden Company commenced an ac-
tion against defendant in the United States District Court.
It was claimed that the manufacture and sale of said
infringement by defendant was an infringement of com-
plaint's latest patent therein described.

That after the execution of said purported agreement
the suit was so commenced by complaint and the Hedden Company
was not dismissed, but was still being actively prosecuted by
the parties complaint thereto, and was still pending at the
time of the filing of defendant's answer herein.
In response to the filing of defendant's answer it
was a cross-bill against complaint, wherein it set forth
facts which it claimed showed that the aforesaid purported
agreement was in fact a nullity.

The cross-bill proved that the said purported con-
tract was null and void and of no effect, and that it
was null and void and that the complaint be restrained from further
prosecution in any way with the business of the defendant.
The said Hedden Company was not made a party defend-
ant in the said cross-bill, although it is herein that it was the
exclusive licensee of the patent in question.

Without directly passing upon the question, it may
be stated for the purpose of this opinion, that the said pur-
ported agreement was properly executed by the parties thereto.
However, it is a well settled rule that a court of equity will
not enforce the specific performance of a contract unless it was
entered into with full knowledge and without misrepresentation
or oppression. Leahy v. Stone, 141 Ill. 52.

It appears from the testimony of the complaint
that in the course of the negotiations preceding the
execution of the said purported contract by the said Hedden

that complainant assured him that so far as the royalties were concerned, the Redden Company was paying the same amount of royalty as was provided for in defendant's purported contract, and that the Redden Company would have no advantage over the defendant in that respect.

The evidence further shows that on the day of the execution of the said purported agreement, complainant in writing modified the Redden Company's license agreement, by reducing the royalty charge from seven dollars (\$7.00) to five dollars (\$5.00) per attachment.

An examination of the Redden Company's contract and a comparison thereof with the purported agreement in question, discloses that the former provided for a minimum guaranty of five hundred dollars (\$500.00) per month for the first six (6) months of its term and one thousand dollars (\$1,000.00) per month thereafter, while the latter provided for a minimum royalty guaranty of one thousand dollars (\$1,000.00) per month from the date thereof.

In view of the foregoing, complainant was not entitled to specific performance of the said alleged contract.

It further appears from the evidence, that from time to time subsequently to September 29, 1916, complainant published advertisements in certain newspapers and periodicals, and circulated extensively among the automobile truck trade throughout the United States, letters stating in effect, that the defendant company was an infringer of the complainant's patent rights and that all persons selling or using such devices other than those manufactured and sold by the Redden Company, would be prosecuted therefor. In view of such conduct on the part of the complainant after he had learned that the defendant company had disavowed the purported agreement and refused to be bound by it, it is clear that the complainant elected to rescind the agreement.

that defendant assumed him that he was the royalties were
received, the Hedden Company was paying the same amount of
royalty as was provided for in defendant's purported contract,
and that the Hedden Company would have no advantage over the
defendant in that respect.

The evidence further shows that on the day of the
execution of the said purported agreement, complaint in
writing notified the Hedden Company's license agreement, by
retaining the royalty charge from seven dollars (\$7.00) to
five dollars (\$5.00) per attachment.

An examination of the Hedden Company's contract and
a comparison thereof with the purported agreement in question,
disclosed that the former provided for a minimum quantity of
five hundred dollars (\$500.00) per month for the first six (6)
months of its term and one thousand dollars (\$1,000.00) per
month thereafter, while the latter provided for a minimum
royalty quantity of one thousand dollars (\$1,000.00) per month
from the date thereof.

In view of the foregoing, complaint was not
advised to specific performance of the said alleged contract.
It further appears from the evidence, that from time
to time subsequently to September 20, 1916, complaint published
statements in certain newspapers and periodicals, and cir-
culated extensively among the automobile truck trade throughout
the United States, letters stating in effect, that the defendant
company was an infringer of the complainant's patent rights and
that all persons relying on using such devices other than those
manufactured and sold by the Hedden Company, would be prosecuted
therefor. In view of such conduct on the part of the complainant
after he had learned that the defendant company had discovered
the purported agreement and refused to be bound by it, it is
clear that the complainant acted to rescind the agreement.

Having thus treated it as abandoned, he could not afterwards enforce same. Chicago Washed Coal Co. v. Whitsett, 278 Ill. 623.

We conclude, therefore, that the court properly dismissed the bill of complaint for want of equity, on either or both of the grounds hereinabove set forth.

It is also argued that the court erred in canceling the alleged contract pursuant to the prayer of the cross-bill, without making the Redden Company a party defendant thereto. While the Redden Company had the exclusive license to manufacture and sell the said attachment device, yet its interest in the purported contract in question between complainant and the defendant company, was merely to consent that the defendant company might also manufacture and sell this device, from which the Redden Company was to receive no benefit whatsoever. Its interest being merely nominal and no relief being sought against the said Redden Company, it was therefore not a necessary party to the cross-bill. 16 Cyc. 182 and cases cited.

There being no error in the record which justifies a reversal, the decree will be affirmed.

AFFIRMED.

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

we contained, therefore, that the court properly

It is also argued that the report is incorrect.

1. The above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information.

THESE ARE THE RESULTS OF THE INVESTIGATION CONDUCTED BY THE BUREAU OF THE ARMY AND NAVY DEPARTMENT.

Information reported in this report is based on the information provided by the respondents and is not intended to be used for any other purpose.

and this was, indeed, the case. The fact that the
the following was to be used as a basis for the

Company, it was therefore not a necessary part

There being no error in the record which justified a

[illegible]

217 - 23970

WILLIAM SCHMIDT and
GEORGE SCHMIDT (Complainants),

RIVERVIEW PARK COMPANY,
a corporation, (Defendant),
Plaintiffs in Error,

vs.

AUGUSTA MILLER and ANTONIA M.
G. DOSCH and the STATE BANK OF
CHICAGO, a corporation, Trustees
under the last will of George
Goldman, deceased, (Complainants),
WILLIAM M. JOHNSON, PAUL W. COOPER,
NICHOLAS P. VALERIUS, JOSEPH B.
CLOHER, ANDREW H. PHELPS and
FIDELITY AMUSEMENT COMPANY,
(a corporation), (Defendants),
Defendants in Error.

213 I.A. 666

ERROR TO

CIRCUIT COURT

OF COOK COUNTY.

RIVERVIEW PARK COMPANY, a
corporation, (Cross-Complainant),

WILLIAM SCHMIDT and GEORGE SCHMIDT,
(Cross-Defendants),
Plaintiffs in Error,

vs.

WILLIAM M. JOHNSON, PAUL W. COOPER,
NICHOLAS P. VALERIUS, JOSEPH B. CLOHER,
ANDREW H. PHELPS, ANTONIA M. G. DOSCH,
and STATE BANK OF CHICAGO, Trustees,
etc., FIDELITY AMUSEMENT CO., a
corporation, and AUGUSTA MILLER,
(Cross-Defendants),
Defendants in Error.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is a writ of error to reverse a decree dismissing
for want of equity complainants' amended bill of complaint and
the cross-bill filed by the defendant, the Riverview Park Company,
a corporation (hereinafter called the Park Company).

On October 10, 1911, William Schmidt, George A. Schmidt,
George Goldman, and Mrs. Augusta Miller, as minority stockholders

RECEIVED BY THE COURT (Exhibits),

EXHIBIT NO. 1077
A. J. BROWN, JR.,
Plaintiff in Error,

81-17-688

STATE OF MISSISSIPPI
IN SENATE
JANUARY 10, 1907.

REPORT MADE BY A. J. BROWN, JR.,
Plaintiff in Error, and the STATE BANK OF
MISSISSIPPI, a corporation, Trustees
of the last will of George
A. Brown, deceased, (Complainants),
VERSUS
WILLIAM W. JOHNSON, PAUL W. COOPER,
ALBERT T. VALLERIE, JOSEPH D.
BROWN, ANDREW H. FRANKS and
JOHN L. LAMBERT, Defendants,
(Defendants in Error).

EXHIBIT NO. 1077
A. J. BROWN, JR.,
Plaintiff in Error,

VERSUS
WILLIAM W. JOHNSON, PAUL W. COOPER,
ALBERT T. VALLERIE, JOSEPH D.
BROWN, ANDREW H. FRANKS and
JOHN L. LAMBERT, Defendants,
(Defendants in Error).

EXHIBIT NO. 1077
A. J. BROWN, JR.,
Plaintiff in Error, and the STATE BANK OF
MISSISSIPPI, a corporation, Trustees
of the last will of George
A. Brown, deceased, (Complainants),
VERSUS
WILLIAM W. JOHNSON, PAUL W. COOPER,
ALBERT T. VALLERIE, JOSEPH D.
BROWN, ANDREW H. FRANKS and
JOHN L. LAMBERT, Defendants,
(Defendants in Error).

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is a writ of error to reverse a decree dissolving
the trust of equity complainants' amended bill of complaint and
the cross-bill filed by the defendant, the Riverview Bank Company,
a corporation (hereinafter called the Bank Company).
On October 10, 1901, William Johnson, George A. Schmidt,
James Goldman, and Mrs. Augusta Miller, as minority stockholders

of the Park Company, on behalf of themselves and other stockholders who might desire to join, filed a bill of complaint against the Park Company and Paul W. Cooper, Nicholas P. Valerius and William M. Johnson, the three latter as sole officers and the majority stockholders and directors of said company, and others, as parties defendant.

The bill, after setting forth the organization of the Park Company, the number of shares and the par value of its capital stock, together with the names of its stockholders and the number of shares held by each, charged that the said Cooper, Valerius and Johnson controlled the majority of the capital stock of the Park Company and that they constituted three of the five members of its board of directors; that the Park Company was in the amusement business, deriving its income from fees charged for amusements furnished and percentages paid to it by third persons known as concessionaires, for the privilege of operating amusement devices on the park premises; that the season during which the park was open for patrons was from about the middle of May to the middle of September of each year.

That on or about September 15, 1905, the said Cooper, Valerius and Johnson fraudulently and unlawfully entered into a conspiracy to defraud the minority stockholders of the Park Company, by fraudulently and unlawfully exploiting and converting its funds, assets, profits and property, together with the good will, to and for the benefit of the said Cooper, Valerius and Johnson, and to that end committed the several acts in the bill complained of.

That on or about December 1, 1905, the said Cooper, Valerius and Johnson, in pursuance of the said conspiracy, entered into a contract for and on behalf of the Park Company, by the terms of which one Andrew E. Phelps and one Joseph E. Cloher (appellees herein) were given the privilege of operating

of the Park Company, on behalf of themselves and other stock-

holders who might desire to join, filed a bill of complaint

against the Park Company and Louis A. Cooper, Nicholas P. Valerius

and William A. Johnson, the three last named as sole officers and the

majority stockholders and directors of said company, and others,

as parties defendant.

The bill, after setting forth the organization of the

Park Company, the number of shares and the par value of the

capital stock, together with the names of its stockholders and

the number of shares held by each, charged that the said Cooper,

Valerius and Johnson controlled the majority of the capital stock

of the Park Company and that they constituted three of the five

members of the board of directors; that the Park Company was in

the management business, deriving its income from fees charged for

services furnished and contemplated paid to it by third persons

and in consideration, for the privilege of operating amusement

devices on the park premises; that the season during which the

park was open for business was from about the middle of May to the

middle of September of each year.

That on or about September 12, 1905, the said Cooper,

Valerius and Johnson fraudulently and unlawfully entered into a

contract to extend the minority stockholders of the Park

Company, by fraudulently and unlawfully acquiring and converting

the funds, assets, profits and property, together with the good

will, to and for the benefit of the said Cooper, Valerius and

Johnson, and to that end committed the several acts in the bill

alleged.

That on or about November 1, 1905, the said Cooper,

Valerius and Johnson, in pursuance of the said conspiracy,

entered into a contract for and on behalf of the Park Company,

by the terms of which one George H. Johnson and one Joseph H.

a large number of minor concessions, some of which were included under the name of "The Pike", for the consideration of a flat sum of five hundred dollars (\$500.00) per week, as compensation to the Park Company, which minor concessions it was understood and contemplated, were to be sublet by the said Phelps and Cloher on a percentage basis, ranging from forty to fifty per cent of the gross receipts derived from the said minor concessions.

That at the time of entering into the said contract, the said Cooper, Valerius and Johnson, and the said Phelps and Cloher, further and in pursuance of the said conspiracy, agreed among themselves that the said Phelps and Cloher divide equally with the said Cooper, Valerius and Johnson the net profits derived from the operation of the concessions in question.

That since the making of the said contract with the said Phelps and Cloher, the latter have continued to operate thereunder and have, by reason of the premises, paid the said Cooper, Valerius and Johnson, as the latter's one-half share of the net profits, sums of money aggregating upwards of forty thousand dollars (\$40,000.00) which the said Cooper, Valerius and Johnson have retained and used for their own benefit.

That the acts of the conspirators aforesaid were a fraud upon the Park Company and the complainants; that all moneys included in the one-half share of the said profits received by the said Cooper, Valerius and Johnson from the said Phelps and Cloher, were in fact and in law but moneys paid for the privilege of operating and controlling the concessions covered by the said last mentioned contract, and in fact and in law all of the said last mentioned moneys were the property of the Park Company.

The bill prayed for an accounting, and that the respective rights of the defendants be ascertained; that the defendants and each of them be decreed to pay to the Park Company or to the receiver to be appointed for it, such sums as may be

A large number of minor transactions, some of which were included
under the name of "The Bank", for the consideration of a fine
and a five hundred dollars (\$500.00) per week, as compensation
to the bank manager, which minor transactions it was understood
and contemplated, were to be added by the said Philip and John
in a separate bank, ranging from twenty to fifty per cent of
the gross receipts derived from the said minor transactions.

That at the time of entering into the said contract,
the said Philip, Voltaire and Johnson, and the said Philip and
John, entered into in possession of the said company, agents
and commission that the said Philip and John divide equally
with the said Cooper, Voltaire and Johnson the net profits arising
from the operation of the transactions in question.

That since the making of the said contract, with the said
Philip and John, the latter have continued to operate the same
and have, in view of the business, with the said Cooper,
Voltaire and Johnson, as the latter, one-half share of the net
profits, sum of money representing upwards of forty thousand
dollars (\$40,000.00) which the said Cooper, Voltaire and Johnson
have retained and used for their own benefit.

That the acts of the commission of the said bank
from upon the bank company and the complainant; that all money
received in the one-half share of the said profits received by
the said Cooper, Voltaire and Johnson from the said Philip and
John, were in fact and in law not money paid for the privilege
of carrying on and controlling the transactions covered by the said
last mentioned contract, and in fact and in law all of the said
last mentioned money was the property of the bank company.

The bill prayed for an accounting, and that the
complainant should be restored to the position he occupied; that the
defendants and each of them be ordered to pay to the complainant
or to the receiver to be appointed for it, such sum as may be

found upon such accounting to be due from them respectively, to the Park Company; that a receiver pendente lite be appointed for the Park Company, with the usual powers incident thereto, to prosecute and recover for the Park Company such claims as may not be recoverable under this proceeding. The bill, however, did not tender equity or seek to reach the interests of the said Phelps and Cloher in the contract in question.

The said Phelps was not made a party defendant thereto, and while the said Cloher was, it is conceded that the only object in doing so was to reach certain real estate held in his name which it was alleged belonged to the said Cooper, Valerius and Johnson.

Answers to the said bill were filed by the said Cooper, Valerius and Johnson and the said Cloher, in which they denied the several charges of fraud and conspiracy alleged in the bill of complaint. The Park Company also filed answer thereto wherein it admitted the said charges of fraud and conspiracy.

On April 29, 1912, an agreement was entered into between the complainants (parties of the first part), the said Cooper, Valerius and Johnson (parties of the second part), and the Park Company (party of the third part), by the terms of which it was agreed that the parties of the second part should forthwith, jointly and severally, assign to the party of the third part or to such person or persons as the parties of the first part might designate, among other things, "the second parties' three-fifths interest in the Pike concession contract and the business and assets of Phelps and Cloher, sometimes known as the Pike Company, and a waiver by the second parties of all rights thereunder." This evidently refers to the Pike concession contract of 1907, hereinafter referred to, which was substantially a renewal of the Pike contract of 1905 already referred to, except as to the rent to be paid to the Park Company and the interest of the said Cooper, Valerius and Johnson therein.

found from such accounting to be the same from respectively,
to the said company, that a receiver should be appointed
for the said company, with the usual powers incident thereto, so
that the receiver for the said company could claim to pay the
dividends under this proceeding. The bill, however, did not
contain any such provision for such the interests of the said company
and it was in the context in question.
The said receiver was not made a party defendant thereto,
and while the said receiver was, it is contended that the only
object in doing so was to reach certain real estate held in his
name which it was alleged belonged to the said company, Valerius
and Johnson.
Answer to the bill was filed by the said company,
Valerius and Johnson and the said receiver, in which they denied
the several charges of fraud and conspiracy alleged in the bill as
unlawful. The said company also filed answer thereto wherein it
admitted the said charges of fraud and conspiracy.
On April 20, 1912, an agreement was entered into between
the said company (petitioner of the first part), the said receiver,
Valerius and Johnson (petitioners of the second part), and the said
company (party of the third part), by the terms of which it was
agreed that the petition of the second part should terminate,
thirty and revocably, except to the party of the third part or
to such person or persons as the parties of the first part might
designate, among other things, "the second petition" should terminate
in the said concession contract and the business and assets
of the said company, and
"subject by the second parties of all rights whatsoever." This
agreement referred to the said concession contract of 1907, wherein
after referred to, which was substantially a renewal of the said
contract of 1900 already referred to, except as to the rent to be
paid to the said company and the interest of the said receiver,
Valerius and Johnson.

Thereupon the said Cooper, Valerius and Johnson resigned as officers and directors of the Park Company, and complainants became the majority stockholders, directors and officers thereof.

On May 8, 1912, an order was entered by the court, authorizing the receiver to operate the so-called ^{Pike}/concessions, until the further order of court.

On November 29, 1912, complainants filed an amendment to their aforesaid bill, whereby the said Phelps was made a party defendant and in which they charged that on and prior to June 10, 1907, the said Phelps and Cleher entered into a conspiracy with the said Cooper, Valerius and Johnson, pursuant to which the former, pretending that they alone were interested, should apply to the Park Company for the proposed concession to them of the so-called Pike privileges during the park season of 1907, and for seven (7) park seasons next ensuing; that the said Cooper, Valerius and Johnson should so act and vote as officers and directors of the Park Company, as to cause it to award a new contract in lieu of that of 1905, hereinabove described, which by its terms would not have expired until the end of the park season of 1907, substantially as applied for, with the further understanding that the said Cooper, Valerius and Johnson should receive from the said Phelps and Cleher three-fifths of the net profits derived from the exercise thereof under the firm name of Phelps and Cleher, or the Pike Company, of the privileges to be thus fraudulently procured and granted ostensibly to the said Phelps and Cleher.

That on June 25, 1907, pursuant to the said agreement between the said five conspirators and to the acts of the said Cooper, Valerius and Johnson at a pretended directors' meeting, and to the said conspiracy, and for the purpose and with the intention of cheating and defrauding the Park Company and its stockholders other than the said Cooper, Valerius and Johnson, the said five conspirators pretendedly executed or caused to be

10-10-1937

Thereafter the said company, Valerius and Johnson continued
as officers and directors of the said company, and consequently
became the majority stockholders, directors and officers thereof.
On May 3, 1937, an order was entered by the court,
relating the records to provide the same as a condition, only
the records were to be kept.
On November 22, 1937, the said company filed an amendment to
its articles of incorporation, whereby the said company was made a party
thereto and in which they changed their name to Valerius
and Johnson, Valerius and Johnson entered into a partnership with the
said company, Valerius and Johnson, pursuant to which the company
operated and they alone were interested, whereby they to the
said company for the proposed amendment as then of the amended
the articles during the year ending 1937, and for seven (7)
years thereafter and ending the said company, Valerius and
Johnson to act and vote as officers and directors of the
said company, as to cause it to enter a new contract in lieu of
that of 1937, respectively described, which by its terms would not
be applied until the end of the year ending 1937, substantially
as applied for, with the further understanding that the said company,
Valerius and Johnson should receive from the said Valerius and Johnson
the amount of the net profits derived from the exercise thereof
the same as the name of Valerius and Johnson, or the said company, or
the parties to be thus beneficially protected and granted
entirely to the said Valerius and Johnson.
That on June 22, 1937, pursuant to the said amendment
between the said five companies and to the end of the said
year, Valerius and Johnson as a partnership, consisting
and to the said company, and for the purpose and with the
intention of creating and obtaining the said company and the
partnership from the said Valerius and Johnson,
the said five companies beneficially owned or owned by

-2-
executed, the pretended Pike concession contract of 1907.

That thereafter, up to and including the park season of 1911, the so-called Pike Company (consisting of the said Cooper, Valerius, Johnson, Phelps and Cloher), exercised the rights and privileges pretendedly granted by the said last mentioned contract and derived therefrom a large profit, to-wit, fifty thousand dollars (\$50,000.00), a part of which, to-wit, thirty thousand dollars (\$30,000.00), was by the said Phelps and Cloher turned over to the said Cooper, Valerius and Johnson, - all of which was by the said conspirators retained and used by them or some of them and converted to their own use, pursuant to the said conspiracy.

The amendment sought no additional relief and merely prayed for a summons to issue against the said Phelps.

To the amended bill the said Phelps filed a plea setting forth that by virtue of an alleged settlement agreement entered into on April 29, 1912, between the complainants, the defendants and the Park Company, the said Cooper, Valerius and Johnson were released from all liability under the said Pike contract; and that such release similarly operated as a release and discharge of him.

On July 16, 1915 (after the said Pike concession contract of 1907 had by its terms expired), the said Phelps and Cloher filed a joint petition asserting their right to a two-fifths interest in the proceeds of the said Pike contract, and asking that the court direct the receiver to pay over such moneys so held which represented their said interest in said contract.

On July 23, 1915, the court upon a hearing ordered the receiver to deposit with the clerk of the court such moneys as represented the interest claimed by the said Phelps and Cloher in the said Pike contract of 1907.

On July 24, 1916, the court upon a hearing granted the receiver to deposit with the clerk of the court such moneys as represented the interest claimed by the said Thoms and Gishney in the said title contract of 1907.

On October 9, 1915, the Park Company filed a cross-bill and a supplement to the amended bill of complaint, in which the charges of fraud and conspiracy alleged in the said amended bill were restated; and further charged that as a part of the unlawful and fraudulent conspiracy aforesaid, it was understood and agreed by and between the said five conspirators, that during the term of the said Pike concession contract of 1907, ostensibly in the names of the said Phelps and Clicher, the latter should devote and allot booths and space within the park premises to unlawful purposes and uses not consistent with the laws of the state of Illinois, viz., gambling, and other games of chance of divers characters prohibited by the laws of said State; and that after the execution of the said Pike contract of 1907, the said five conspirators did operate or permit to be operated on space within the said park enclosure, unlawful gambling games and unlawful games of chance, and divided all or part of the unlawful winnings and unlawful profits obtained by the said Phelps and Clicher therefrom in proportions and in accordance with the unlawful agreement aforesaid; that the so-called Pike concession contract of 1907 is and always was void, and that by reason of the premises, the matters and things thereinabove set forth, the said contract was unfair, unreasonable and not of binding force and effect against the Park Company; that the rates of compensation to the Park Company provided in said Pike concession contract of 1907 were inadequate, unfair and unreasonably small as compensation to the Park Company for the rights and privileges therein and thereby pretendedly granted.

The said cross-bill prayed that the so-called Pike concession contract of 1907 be declared and decreed null and void; that the funds and property in the custody and possession of the court be decreed to be the property of the Park Company, and ordered paid and turned over to it; and concluded with a prayer for general relief.

On October 8, 1918, the Park Company filed a cross-motion

and a demurrer to the amended bill of complaint, in which the

grounds of fraud and conspiracy alleged in the said amended bill

were traversed, and further charged that as a part of the alleged

and fraudulent conspiracy of 1907, it was understood and known

by and between the said five conspirators, that during the term of

the said five conspirators, in 1907, respectively in the names

of the said John and Joseph, the latter being named and also

known and well within the knowledge of numerous persons and uses

and connected with the name of the said John and Joseph, etc.,

and other names of persons of different characters and

alleged by the fact of said alleged and that after the execution

of the said five conspirators in 1907, the said five conspirators did

continue to attempt to be employed in various ways in the said park

company, and that the said five conspirators did continue to

act as part of the conspiracy of 1907, and that the said five

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A joint answer was filed to said cross-bill by the said Phelps and Cloher, in which they alleged that the aforesaid agreement of April 29, 1912 (which they characterized as a settlement agreement) did not in fact express the real agreement between the parties thereto but that a separate agreement was entered into by and between the said parties, wherein and whereby the said Cooper, Valerius and Johnson were released and discharged from all claims and demands arising out of the said Pike concession contract of 1907.

Their said answer admitted that the said Cooper, Valerius and Johnson had no beneficial interest in the subject matter of the suit but denied that the complainants or cross-complainant had or have any right or interest whatever in their share of the profits arising out of the said Pike concession contract of 1907.

It further denied the existence of any fraud or conspiracy as contained in the cross-bill, and charged that the said Phelps and Cloher were summarily dispossessed and their possession under the aforesaid Pike concession contract of 1907 invaded by the appointment of a receiver for their said business, which they alleged was done without notice to them.

The answer further admitted that a number of booths and structures operated under the said Pike concession contract were devoted to various forms of gambling, which fact, they aver, was known to all the parties, including the Park Company and the complainants.

On April 19, 1916, a decree was entered, dismissing for want of equity the original bill as amended, together with the cross-bill filed by the Park Company and ordering that the fund then in the hands of the clerk of the court, representing the two-fifths interest claimed by the said Phelps and Cloher in the profits derived from the operation by the receiver of the concessions described in the Pike concession contract of 1907, be paid over to the said Phelps and Cloher, less costs; from

A joint answer was filed to said cross-bill by the said

Boeing and Glaser, in which they alleged that the respondents

agreement of April 22, 1935 (which they characterized as a settlement

agreement) did not in fact express the real agreement between the

parties therein and that a separate agreement was entered into by

and between the said parties, whereby and whereby the said Boeing

and Glaser were released and discharged from all claims

and claims arising out of the said Boeing-Glaser contract of 1935.

Their said answer admitted that the said Boeing, Glaser and

and Glaser had no beneficial interest in the subject matter of the

bill but denied that the complainants or respondents had or

have any right or interest whatever in their share of the profits

arising out of the said Boeing-Glaser contract of 1935.

It further denied the existence of any business conspiracy

as alleged in the cross-bill, and alleged that the said Boeing and

Glaser were lawfully licensed and their activities were the

lawful business of the respondents of 1935 entered by the respondents

of a business for their said business, which they alleged was done

lawfully and in good faith.

The answer further admitted that a number of Boeing and

Glaser operated under the said Boeing-Glaser contract were

devoted to various forms of gambling, which fact, they aver, was

known to all the parties, including the Boeing company and the

respondents.

On April 12, 1936, a decree was entered, dissolving

the partnership and the said Boeing-Glaser contract was

terminated and the Boeing company and respondents and the

parties in the hands of the court, representing

the two-fifths interest claimed by the said Boeing and Glaser

in the profits derived from the partnership by the respondents of 1935

respondents described in the Boeing-Glaser contract of 1935,

be paid over to the said Boeing and Glaser, less costs; then

which decrees this appeal is prosecuted.

Several perplexing questions are presented and argued in the voluminous briefs filed herein on behalf of appellants, but two of which we deem it necessary to pause upon in disposing of this appeal:

1. Was the Pike concession contract of 1907 void or voidable?

2. If voidable, was it ratified by the Park Company?

The original bill filed October 16, 1911, on behalf of the minority stockholders made no mention of the alleged gambling feature of the said Pike contract. This charge was made for the first time in the Park Company's cross-bill filed October 9, 1915, after the said Pike contract had by its terms expired. The answer of the defendants, Phelps and Glaser, to the cross-bill filed by the Park Company admitted that a number of booths and structures operated under the Pike contract were devoted to gambling, which fact, they charged, was known to all the parties, including the Park Company and the complainants. Each of the booths and structures were devoted to gambling is not disclosed by the answer. That the said Pike concession contract of 1907 is divisible, and that the unlawful features thereof were severable from the lawful ones, clearly appears from the record. The fund here in litigation was derived from the operation of the said Pike contract by the receiver, and the court expressly found that the receiver operated no gambling devices.

It also appears from the record that objections were filed to certain items of expense contained in the receiver's report, on the ground that they arose out of gambling transactions. The Park Company then took the position that no gambling devices were operated by the receiver, and the court, in sustaining such contention, held, and we think properly so, that no gambling devices of any nature were conducted during his administration of the

...this report is prepared.

Several points have been presented and argued.

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...it is necessary to have a clear understanding of the situation.

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Park Company's affairs. Hence, complainants are not now in a position to assail the validity of the said Pike concession contract on that ground.

When the Pike concession contract of 1907 was entered into, Cooper, Valerius and Johnson were the majority stockholders of the Park Company and they also comprised a majority of the board of directors of said company, and consequently were in a position to dominate the directorate. Whether or not the minority stockholders or directors of the Park Company knew of their interest in the said Pike contract is a disputed question. Assuming, however, that it was unknown to them and that there was a fraudulent conspiracy as charged, still the Pike contract of 1907 was not ipso facto void for that reason, but merely voidable at the election of the Park Company, and was therefore subject to ratification. Hertimer v. McMullen, 202 Ill. 413; Naugle et al. v. Yerkes, 187 Ill. 358; Brady v. Cole, 164 Ill. 116.

The question therefore arises, Was there a ratification of the said contract?

It will be noted that insofar as the questions here presented are concerned, the original bill filed by the minority stockholders sought to recover the interests of only Cooper, Valerius and Johnson in the said Pike contract, and in the prayer for relief complainants asked that an accounting be had with all of the said defendants except Cloher. Phelps was not even made a party defendant to the bill, and it is clear that Cloher was made a party defendant for the sole purpose of reaching certain real estate standing in his name which it was claimed belonged to the said Cooper, Valerius and Johnson.

As already set forth, on April 29, 1912, an agreement was entered into between the minority stockholders (complainants in the amended bill of complaint), Cooper, Valerius and Johnson, and the Park Company. This agreement recited that, whereas

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disputes had arisen as to matters growing out of the operation of the Park Company, which were the subject of litigation which it was desired to terminate, it was agreed that the said Cooper, Valerius and Johnson (parties of the second part), should forthwith jointly and severally assign and turn over to the Park Company or to such person or persons as might be designated, their three-fifths interest in the Pike concession contract of 1907, and in the business and assets of Phelps and Cleher; that the said Cooper, Valerius and Johnson should immediately resign as directors and officers of the Park Company, in consideration of all of which the complainants in the original bill, and the Park Company covenanted not to sue them on account of any claims or demands arising prior to the execution of the said Pike contract of 1907. The said agreement further recited that anything that might be done in pursuance thereof should not be construed as payment or satisfaction by, or a release or discharge of the said Cooper, Valerius and Johnson.

It will be noted that in the agreement of April 29, 1912, the complainants and cross-complainants (the Park Company), recognized the existence of the Pike concession contract of 1907, by expressly referring thereto and by taking an assignment to the Park Company of a three-fifths interest therein from the said Cooper, Valerius and Johnson, and this at a time when they had full knowledge of the facts relating to the latter's interest therein, as also shown by the sworn bill of complaint theretofore filed; that by order of court dated May 8, 1912, the receiver began to operate the Pike concessions, and thereafter continued to do so during the park seasons of 1912, 1913 and 1914 and until the Pike contract expired by its terms; and that during such times the receiver, without further order of court, turned over to the Park Company, and the latter accepted, three-fifths of the net profits derived from the operation of the Pike concessions. The receiver also paid to the Park Company under like circumstances, during each

legislation was either as a national emergency or as the operation of

the Park Company, which were the subject of legislation which is

now limited to the National Park Service, it was argued that the said company

should be dissolved (provision of the second amendment), should be dissolved

and its assets and liabilities should be transferred to the National Park Service

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week of the entire period aforesaid, the sum of \$360.00, representing the weekly rental provided for by the said Pike contract of 1907, for which the Park Company issued to the receiver its receipts, acknowledging said payments as rent under the Pike contract of 1907.

In our opinion, the conduct of the minority stockholders and of the Park Company in this respect, can be reasonably reconciled with but one theory, viz., that they recognized and ratified the said Pike contract of 1907 in the manner aforesaid and continued to accept the benefits thereunder until its expiration by its terms.

One may not treat a contract as subsisting for the purpose of claiming benefits thereunder, and later treat it as rescinded for the purpose of escaping obligations arising therefrom. We think the following language of our Supreme Court in Mortimer v. McMullen, supra, is applicable to the case at bar, p. 418:

"It is a familiar rule, and settled by a long line of authorities, that where a party discovers that fraud has been practiced upon him in the making of a contract, it is his duty at once to repudiate the contract and tender back what has been received by him under its terms, so that all parties may be placed as near as possible in the position occupied before the contract was consummated." (citing Brady v. Cole, supra, and Naugle et al. v. Yerkes, supra).

In the case at bar, neither the complainants nor the cross-complainant have at any time tendered or offered to do equity in this respect.

In view of all the foregoing circumstances, we are of the opinion that the complainants and the cross-complainant are precluded from rescinding the said Pike contract of 1907, and that the court properly dismissed the amended bill of complaint and the cross-bill for want of equity.

Accordingly the decree will be affirmed.

AFFIRMED.

...of the entire period of ownership, the sum of \$200,000, representing
...provided for by the said lease contract of 1907.
...the said lease contract issued to the receiver for the purpose,
...paid payment as provided under the said contract of 1907.
...the contract, the conduct of the mining operations
...the New York Company in this respect, can be reasonably determined
...that they recognized and admitted the said
...of 1907 in the manner aforesaid and continued to occupy
...the premises throughout until its expiration by its terms.

...the way not to treat a contract as a condition for the purpose
...and later found to be unenforceable for
...the purpose of imposing obligations arising at common law. It is the
...of the contract to be enforced in equity.
...it is enforceable in equity at law, it is enforceable in equity.

"It is a well-known fact, and noted by a long line of
...that when a party discovers that a contract has been
...in the making of a contract, it is his
...of one to terminate the contract and return the other
...of him under its terms, as that all parties
...in the position of a party to a contract
...the contract was consummated." (See Smith v. Smith,
...Smith v. Smith.)

In the case at bar, neither the complainant nor the
...have been shown to be entitled to an
...equity in this respect.

In view of all the foregoing circumstances, it is the
...the solution that the complainant and the respondent is not
...the said lease contract of 1907.
...the court properly dismissed the second bill of
...and the cross-bill for want of equity.
Accordingly the decree will be affirmed.

ATTORNEYS.

143 - 24062

ELLA MEYER,
Defendant in Error,

vs.

PROVIDERS LIFE ASSURANCE
COMPANY, a corporation,
Plaintiff in Error.

213 I.A. 666

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is a writ of ^{error} by the defendant, the Providers Life Assurance Company, from a judgment for \$181.00 in favor of the plaintiff, Ella Meyer, who brought suit for the recovery of a death benefit alleged to be due her as beneficiary, under a policy issued on the life of her deceased husband.

The policy in question was dated July 22, 1916, and the assured died on August 27, - approximately five weeks later. The required proofs of death were furnished by plaintiff to the defendant, but payment was refused, on the ground that the policy had been procured by fraud and misrepresentation of material facts.

The said policy contained a clause which provided that it should be void if before its date the assured had been attended by a physician for any serious disease or complaint, or had had any pulmonary disease, or chronic bronchitis, etc.

The application for insurance contained among others, the following question to the insured.

"State nature and duration of all illness that Life proposed has had within the past two years. Give names of all physicians who have attended said Life in that time,"

which said question was answered, "None".

It is contended by the defendant that the foregoing answer made thereto by the insured was untrue; that it related

to facts material to the risk, and that hence such misrepresentation rendered the said policy null and void.

Great stress is laid upon the testimony of Dr. Johnson, the physician who attended the insured during his last illness, and who testified that he knew the insured during his lifetime; that the insured called at his office on March 8, 1916, because of a cough and throat trouble; that he examined the insured and found that he had hypertrophied (or enlarged) tonsils, and a deviated septum, making a partial obstruction to the nose; that the insured also had hypertrophy of the turbinated bones on account of the septum being divided; "adenoids, alcoholism and nicotineism;" that he advised the insured to stop drinking intoxicating liquor and smoking cigarettes; that he saw him again during June, 1916, and upon examination found his condition improved.

In ascertaining the facts herein, we have not been materially aided by counsel for plaintiff in his brief, who offered as an excuse therefor a lack of funds on the part of his client. In order to dispose of this case on the merits we are obliged to look to the record for the full facts, wherein we discover the following evidence ^{some of} ~~XXXXXXXXXXXXXX~~ which counsel for defendant has seen fit to abstract:

The said Dr. Johnson, shortly after the death of the insured, made a written statement to the defendant in connection with the required proof of death, wherein he set forth that the cause of death was pulmonary tuberculosis and organic heart disease, the duration of which he did not know. The said statement also contained the following question: "For what disease or diseases have you at any other time attended deceased, and what was their duration?", which the said Dr. Johnson answered, "None."

The record further discloses that at the time the

[illegible]

insured made application for insurance with the defendant company, he was examined by one Dr. Bauer, its examining physician, who made a report of such examination to the defendant company, which said report was a part of the application signed by the insured. This report contained among other things, the following:

"Is the respiratory murmur clear and distinct over both lungs? Yes.
"Is the character of the respiration full, easy and regular? Give Rate. Yes. Respirations per minute 17.
"Are there any indications of disease of the organs of respiration? No.
"Is the character of the heart's action uniform, free and steady? Yes.
"Are its sound and rhythm regular and normal? Yes.
"Are there any indications of disease of this organ or of the blood vessels? No.
"State the rate and other qualities of the pulse.
74 regular.
"Does it intermit, or become irregular or unsteady at this examination? No.

* * * * *

"I have this 19 day of July 1916 personally seen and examined at the address given on page 1 hereof (a) the Life proposed for Insurance, and saw made the signature at the end of Part C, and am of the opinion that the said Life is in (b) good health and that said Life's constitution is (c) sound.
"I find the pecuniary circumstances and hygienic surroundings satisfactory and the insurance applied for in good faith with the purpose of being continued. I therefore recommend said Life to be (d) accepted as (e) 1st class."

From the foregoing, it will be seen that the said Dr. Johnson made contradictory statements regarding the physical condition of the insured and whether or not he had attended him prior to his last illness. Which of these statements were true was a question for the determination of the jury, and in view of the report made by defendant's physician after a personal examination of the insured, in which he made no mention of the conditions testified to by Dr. Johnson, we are not prepared to say that the verdict is clearly and manifestly against the weight of the evidence.

There being no error in the record, the judgment will be affirmed.

...the following:

...this report contained

...which said report was a part of the

...report of such examination to the

...he was examined by one Dr. Brown, the examining

...and was hospitalized for treatment with the following

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, at Washington, D. C., on the subject of the land in question:

[illegible]

From the foregoing, it will be seen that the said Dr. Johnson made contradictory statements regarding the physical condition of the insured and whether or not he had advised him with his last illness. Which of these statements were true and a question for the determination of the jury, and in view of the report made by defendant's physician after a personal examination of the insured, in which he made no mention of the condition testified to by Dr. Johnson, we are not prepared to say that the verdict is clearly and manifestly against the weight of the evidence.

204 - 24126

R. G. AURICH,
Appellee,

vs.

GOODRICH TRANSIT COMPANY,
a corporation,
Appellant.

213 I.A. 666

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, from a judgment for one hundred dollars, in an action in tort for wrongfully and negligently causing the death of plaintiff's horse.

It appears from the evidence that plaintiff delivered the horse in question to the defendant in the city of Chicago, to be transported by boat to Muskegon, Michigan; that he left the said horse tied to a post in a building at defendant's docks, where it remained for about four hours before being taken aboard ship; and that the said horse died shortly thereafter, before reaching its destination.

The issue presented for determination by the pleadings was whether the death of the said horse was caused through the alleged negligence of the defendant in exposing it to a draft where it was tied or through some other cause beyond its control.

Upon the trial defendant offered in evidence the depositions of three witnesses of Muskegon, two of whom were veterinary surgeons who made a post mortem examination to determine the cause of the death of the said horse, and who testified that death was not due to exposure but to intestinal trouble caused by acute indigestion.

The said depositions were taken pursuant to a stipulation of the parties, which provided among other things,

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THURSDAY

NEW YORK

IN NEW YORK

RECEIVED

THIS IS AN AFFIDAVIT BY THE DEFENDANT, JOHN A. HARRIS,
THE ONE HUNDRED EIGHTY, IN THE CITY OF NEW YORK,
AND REGISTRATION NUMBER THE SEVEN OF HARRIS'S NAME.
IT APPEARS FROM THE AFFIDAVIT THAT PLAINIFF'S ALLEGATIONS
THE DATE OF DEATH OF THE DEFENDANT IN THE CITY OF NEW YORK,
AS BEING DECEASED BY JOHN A. HARRIS, NEW YORK; THAT HE WAS
THE DATE OF DEATH OF THE DEFENDANT IN THE CITY OF NEW YORK,
AND THAT HE REMAINED FOR ABOUT TEN HOURS BEFORE BEING
FOUND DEAD; AND THAT THE SAID DEFENDANT WAS
DECEASED, BEFORE REACHING THE DECEASED.
THE DEFENDANT PRESENTED THE AFFIDAVIT BY THE
DEFENDANT AND WHETHER THE DEATH OF THE SAID DEFENDANT WAS CAUSED
THROUGH THE ALLEGED NEGLIGENCE OF THE DEFENDANT IN REGARDING
IT TO A FACT WHERE IT WAS LACK OF THOUGH SOME OTHER CAUSE
WAS THE CAUSE.
UPON THE AFFIDAVIT DEFENDANT WITNESSED IN AFFIDAVIT THE
DEFENDANT OF THREE WITNESSES OF HARRIS, TWO OF WHOM WERE
WITNESSES AND MADE A GOAT WITNESS AFFIDAVIT TO
DEFENDANT THE DEATH OF THE DEFENDANT, THE SAID DEFENDANT, AND THE
DEFENDANT THAT DEATH WAS NOT DUE TO NEGLIGENCE BUT TO NEGLIGENCE
CAUSED BY THE DEFENDANT.
THE SAID DEFENDANT WERE KNOWN WITNESSES TO A

that they were to be returned by the notary public before whom taken, to the clerk of the Municipal Court of Chicago, in a sealed envelope bearing endorsement showing the title of the cause, and that it contained the depositions of the witnesses named. The notary public in question returned the said depositions to the clerk of the Municipal Court but neglected to endorse thereon the title of the cause and the fact that it contained the depositions of the said witnesses.

No motion was made before the trial to suppress the said depositions because of the aforesaid irregularities nor was any objection made to their introduction upon the trial. However, after plaintiff had rested his case and defendant offered the said depositions in evidence, the court on its own motion excluded them because of the aforesaid omissions by the notary public.

It is insisted by defendant that the court erred in so excluding the said depositions.

The aforesaid stipulation with reference to the mailing of the said depositions was practically a recital of the statutory requirements relating thereto. It has been held that such provision is merely directory, and that unless injury may result from such omission a deposition should not be excluded on that account. (Cole v. Choteau et al., 18 Ill. 439; I. & I. S. Ry. Co. v. Wilson & Son, 77 Ill. App. 603.) From an examination of the record before us we are of the opinion that neither injury nor surprise would have resulted from the admission of the said depositions in evidence, and hence the court erred in excluding them.

For the reason assigned the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

that they were to be returned by the notary public before whom
taken, on the day of the Municipal Court at Chicago, in a
called meeting bearing endorsement showing the title of the
must, and that it contained the depositions of the witnesses
present. The notary public in question returned the said
depositions to the clerk of the Municipal Court but neglected
to annex thereon the title of the cause and the fact that it
contained the depositions of the said witnesses.

No action was made before the trial to suppress the
said depositions because of the erroneous investigation and
verbal action made to their introduction upon the trial.
However, after plaintiff has taken his case and testimony
offered the said depositions in evidence, the court on its own
motion excluded them because of the erroneous evidence by
the notary public.

It is insisted by defendant that the court acted
in excluding the said depositions.

Two erroneous stipulations with reference to the
admission of the said depositions was presented in regard to
the statutory requirements relating thereto. It has been held
that such provision is merely directory, and that unless injury
has resulted from such omission a deposition should not be

excluded on that account. (Coff v. Chamber of M., 13 Tex. 230;
L. v. E. E. 20 - v. Wilson & Son, 17 Tex. App. 607.) From an
examination of the record before us we are of the opinion
that whether injury was suffered would have resulted from the
exclusion of the said depositions in evidence, and hence the

court acted in excluding them.
For the reason assigned the judgment will be
reversed and the case remanded.

213 - 24137

BUNGE BROS. COAL COMPANY,
Appellee,

vs.

WESLEY DEMPSTER,
Appellant.

213 I.A. 666

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Wesley Dempster, from a judgment for \$195.45 entered in favor of the plaintiff, Bunge Brothers Coal Company, being the balance due it for coal delivered to the defendant under a certain contract dated September 1, 1916, which provided in part as follows:

"Quantity: Full requirements, estimated at 500 tons to be used for steam purposes in the plant or plants of purchaser, located at various buildings, and not to be sold or diverted for other purposes, from September 1, 1916 until March 31, 1917, deliveries to be made in such quantities as may be ordered from time to time in loads of not less than four tons upon reasonable notice consistent with the requirements of said plant."

Plaintiff delivered to defendant approximately 389 tons of coal, which the evidence shows constituted the full requirements of defendant's buildings from September 1, 1916 to March 31, 1917.

It is contended by defendant that the court erred in denying his claim for set-off for an alleged breach of the said contract by plaintiff in failing to deliver to the defendant the quantity of coal therein provided for.

The sole question here presented is, whether by the terms of the said contract defendant was entitled to receive 500 tons of coal at the contract price, in any event, or merely his requirements from September 1, 1916 to March 31, 1917.

STILL 666

INVESTIGATIVE

OF CHICAGO

This is an appeal by the defendant, Wesley Henderson, from a judgment for \$195.45 entered in favor of the plaintiff, Great Western Coal Company, being the balance due it for coal delivered to the defendant under a certain contract dated September 1, 1916, which provided in part as follows:

"Quantity: Full requirements, estimated as 500 tons to be used for steam purposes in the plant or plant at present, located at various buildings, and not to be sold or diverted for other purposes. Three hundred tons, 1, 1917, delivered in full. It was stipulated as may be ordered from time to time in lots of not less than four tons upon presentation of orders consistent with the requirements of said plant."

Plaintiff delivered to defendant approximately 225 tons of coal, which the evidence shows constituted the full requirements of defendant's buildings from September 1, 1916, to March 31, 1917. It is contended by defendant that the court erred in awarding his claim for set-off for an alleged breach of the said contract by plaintiff in failing to deliver to the defendant the quantity of coal therein provided for. The sole question here presented is, whether or not terms of the said contract defendant was entitled to receive 500 tons of coal at the contract price, in any event, or merely the requirements from September 1, 1916 to March 31, 1917.

As we construe this provision of the contract, plaintiff was thereby required to supply defendant with sufficient coal for his needs during the period specified, viz., from September 1, 1916, to March 31, 1917, the words, "estimated at 500 tons" being limited by the words, "full requirements." Under this provision of the contract plaintiff could not have compelled defendant to accept 500 tons of coal unless the latter's requirements equaled such quantity.

Such construction is not inconsistent with the holding of our Supreme Court in Finch & Co. v. Zenith Furnace Co., 245 Ill. 586, cited and relied upon by the defendant. In that case there was a contract by the terms of which the plaintiff unqualifiedly agreed to purchase "estimated tonnage of 50,000 tons of Ella coal." The court construed that language to mean, approximately that amount. Nothing was said in that contract about requirements, while in the contract now before us the primary obligation is to furnish defendant his full requirements up to March 31, 1917. Obviously, if defendant's requirements up to that time had exceeded 500 tons, plaintiff would have been obligated under the contract to supply the excess.

In our opinion, therefore, the court properly excluded defendant's counter claim, based upon the alleged difference between the contract price and the market value of the coal which defendant insists he was entitled to under the aforesaid provision of the said contract.

There being no error in the record which justifies a reversal the judgment will be affirmed.

AFFIRMED.

As we observe this provision of the contract, plain-

ly it is clearly required to supply defendant with sufficient

fuel for his needs during the period specified, viz., from

September 1, 1916, to March 31, 1917, the words, "estimated

at this time" being inserted by the words, "this requirement."

Under this provision of the contract plaintiff could not have

compelled defendant to supply 500 tons of coal unless the

defendant's requirements exceeded such quantity.

Such construction is not inconsistent with the

holding of our Supreme Court in Smith & Co. v. Smith & Co.

111 Ill. 588, cited and relied upon by the defendant. In

that case there was a contract by the terms of which the

plaintiff was to supply the defendant with "estimated

at this time of 500 tons of coal." The court construed this language

to mean, "estimated at that amount." Nothing was said in that

case as to the time when the estimate was to be made, while in the contract now before

us the estimate is to be furnished defendant his full re-

quirement up to March 31, 1917. Obviously, it defendant's

requirements up to that time had exceeded 500 tons, plaintiff

would have been obligated under the contract to supply the

defendant. In our opinion, therefore, the court properly

construed defendant's counter claim, based upon the alleged

discrepancy between the contract price and the market value

of the coal which defendant insists he was entitled to under

the contract, is provision of the said contract.

There being no error in the record which would justify

a reversal the judgment will be affirmed.

APPROVED.

FILED

RECORD OF THE COURT

IN THE COUNTY OF COOK

STATE OF ILLINOIS

242 - 24167

LOUISE M. EASTMAN, Executrix
of the estate of C. J. EASTMAN,
deceased,

Appellee,

vs.

PROVIDERS LIFE ASSURANCE
COMPANY, a corp.,

Appellant.

213 I.A. 667

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, the Providers Life Assurance Company, a corporation, from a judgment for \$989.25 rendered in favor of C. J. Eastman, in an action for the breach of a contract of hire.

By the terms of the contract in question, plaintiff was employed as superintendent of agencies for a period of one year beginning May 31, 1916, at a weekly salary of \$40.00.

That the defendant breached the said contract and that plaintiff was thereby damaged, is not seriously questioned. Defendant, however, sought to set off a claim amounting to \$501.17 for moneys advanced to the plaintiff on account of commissions, prior to the making of the contract in question.

Plaintiff resisted the allowance of the set-off upon the ground that at the time the said advances were made the defendant was not fully incorporated and hence had no authority to make such advances. In support of this contention plaintiff sought to prove by oral evidence, the date on which defendant was authorized to transact business. The evidence so offered was admitted over objection by the defendant.

The question when the defendant company was authorized to transact business was one of law to be determined by the court under proper proof of the steps taken to perfect its

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VERNAL FROM
MUNICIPAL COURT
OF CHICAGO.

PLAINT IN EQUITY
AT THE COURT OF THE CITY OF CHICAGO

IN FAVOR OF THE PLAINTIFF
AND AGAINST THE DEFENDANT

THE PLAINTIFF, TRUSTEES OF THE
CHICAGO TRUST COMPANY, vs. THE DEFENDANT,

This is an equity case, the Plaintiff, the Trustees of the Chicago Trust Company, a corporation, from a judgment for \$100,000.00 in favor of the Plaintiff, in an action for the recovery of a debt of \$100,000.00.

At the time of the contract in question, Plaintiff was engaged in the management of a business for a period of one year beginning May 1, 1914, at a weekly salary of \$200.00. That the defendant purchased the said contract and that Plaintiff was thereby damaged, is not seriously questioned. Plaintiff, however, sought to set off a claim amounting to \$100,000.00 for money advanced to the Plaintiff on account of the business, prior to the making of the contract in question. Plaintiff resisted the allowance of the set-off upon the ground that at the time the said advances were made the defendant was not fully incorporated and hence had no liability to make such advances. In support of this contention Plaintiff sought to prove by oral evidence, the facts on which defendant was insisted to transact business. The evidence so offered was admitted over objection by the defendant.

The question when the defendant company was authorized to transact business was one of law to be determined by the court under proper proof of the facts taken to prove the

organization, and the court erred in permitting the witness to testify to what was clearly a legal conclusion.

It is admitted that the said \$501.17 was advanced to plaintiff by way of checks drawn by the defendant company against a fund deposited to its credit. Whether or not defendant was at that time authorized to transact business or to use said fund for such purpose is immaterial, since it is admitted that the defendant was at the time of the making of the contract sued upon fully incorporated and has, by its conduct, ratified the said advances.

In our opinion, the court clearly erred in disallowing defendant's said claim of set-off.

Accordingly the judgment will be reversed and judgment entered here for \$488.08, this being the difference between plaintiff's claim and the amount of defendant's said set-off.

REVERSED AND JUDGMENT HERE.

...and the court order in admitting the witness to
testify as was clearly a legal conclusion.

It is admitted that the said \$201.17 was advanced
to plaintiff by way of check drawn by the defendant company.

...and a fund deposited to its credit. Whether or not
defendant was at that time authorized to transact business

or to use said fund for such purpose is immaterial, since it
is admitted that the defendant was at the time of the making

of the payment such upon fully investigated and has, by its
conduct, verified the said statement.

In our opinion, the court clearly erred in dismissing
defendant's claim of set-off.

Accordingly, the judgment will be reversed and
judgment entered here for \$488.05, this being the difference

between plaintiff's claim and the amount of defendant's said
set-off.

REVEREND THE COURT

THE COURT

THE COURT

THE COURT

THE COURT

250 - 24175

DAVID SADRVITZ,

Appellee,

vs.

THEODORE LIND,

Appellant.

213 I.A. 667

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant, Theodore Lind, seeks a reversal of a judgment for \$53.00 rendered against him in an action for the recovery of rent of certain premises.

It is conceded that the defendant occupied the premises described in plaintiff's statement of claim during the month of April, 1917, for which a recovery was allowed; that early in the year 1916 one Lars O. Nelson, who was then the owner thereof, asked defendant to construct a garage on the said premises; that the said Nelson had no ready cash at that time for such purpose, and agreed to allow defendant to occupy the second apartment of his said building and part of the garage, for one year, as payment for the said garage; and that defendant constructed the garage as agreed.

The sole question here presented is, whether defendant's said tenancy expired on March 31 or April 30, 1917.

The undisputed evidence shows that defendant erected the building in which the said apartment was located; that said apartment was not ready for occupancy until the latter part of April, 1916, for which reason and because of the further fact that defendant was obliged to pay rent for the premises then occupied by him until May 1, 1916, he did not take possession of the said apartment until April 21; that the said Nelson assured him that his tenancy would be for

1913 A. 607

WILLIAM H. HARRIS

OF NEW YORK

IN SENATE

COMMISSIONER OF THE LAND OFFICE

It is requested that the following be referred to the committee on the subject of the land office, and that the committee be authorized to report thereon at such time as it may deem proper.

The following is a list of the names of the persons who have been appointed to the various positions in the land office, and who have been sworn in as such:

1. The Commissioner of the Land Office, who is the head of the department, and who is responsible for the management of the land office.

2. The Deputy Commissioner of the Land Office, who is the second in command, and who is responsible for the management of the department in the absence of the Commissioner.

3. The Assistant Commissioner of the Land Office, who is the third in command, and who is responsible for the management of the department in the absence of the Deputy Commissioner.

4. The Surveyor General of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

5. The Surveyor of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

6. The Surveyor of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

7. The Surveyor of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

8. The Surveyor of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

9. The Surveyor of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

10. The Surveyor of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

The following is a list of the names of the persons who have been appointed to the various positions in the land office, and who have been sworn in as such:

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8. The Surveyor of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

9. The Surveyor of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

10. The Surveyor of the Land Office, who is the head of the surveying department, and who is responsible for the management of the surveying department.

one year from May 1, 1916.

While the said Nelson testified, by way of deposition, that the tenancy was to expire March 31, 1917, nevertheless he admitted that defendant was to have the use of the said premises for a period of one year, but that he did not recollect when such term was to begin.

In view of the foregoing testimony, we are of the opinion that defendant's said tenancy did not expire until April 30, 1917.

Plaintiff who purchased the said premises while defendant was still in possession of the said apartment and part of the garage, took them with notice of and subject to the rights of defendant therein, and consequently he could not recover rent for the month in question.

Accordingly the judgment will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

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IN THE CITY OF NEW YORK

IN SENATE

JANUARY 1, 1917

REPORT OF THE COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

ON MAY 1, 1916

AND A RESOLUTION PASSED BY THE SENATE

ON MAY 1, 1916

AND A RESOLUTION PASSED BY THE SENATE

ON MAY 1, 1916

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ON MAY 1, 1916

AND A RESOLUTION PASSED BY THE SENATE

ON MAY 1, 1916

AND A RESOLUTION PASSED BY THE SENATE

253 - 24175

FINDING OF FACTS.

This court finds as a fact that the defendant, Theodore Lind, entered into an agreement with the said Lars O. Nelson, who was then the owner of the premises in question, whereby the former erected a garage for the latter, in payment for which the said Lind was to have the use of the apartment in question and part of the said garage, for one year from May 1, 1916.

THE STATE OF NEW YORK
IN SENATE
JANUARY 14, 1903.
REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1899.

ALBANY:
J. B. LIPPINCOTT & CO.,
PRINTERS.
1903.

269 - 24196

ISADOR A. RUBEL,

Appellee,

vs.

A. LARSEN and CARL W. LARSEN,
Appellants.

213 I.A. 007

Appeal from

Municipal Court

of Chicago.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, A. Larsen and Carl W. Larsen, from a judgment for \$185.00 for rent due under a certain lease, by the terms of which plaintiff leased the premises therein described to defendants, from the first day of May, 1913, to the thirtieth day of April, 1918, at a rental of \$82.50 per month.

It is admitted that defendants vacated the said premises before the expiration of the lease, and the only defense interposed to plaintiff's claim for the rent in question, is an alleged constructive eviction on the part of plaintiff.

The alleged eviction consisted in the placing of an obstruction in the alley, which shut off defendant's means of ingress and egress through the rear entrance to the said premises. This obstruction, the evidence showed, was erected during the month of August, 1915. Defendants vacated the premises on June 15, 1917, up to which time they had always paid the rent regularly and without complaint.

The acts complained of as amounting to an eviction constituted at most a constructive one. The fact that the defendants remained in possession for nearly two years after the aforesaid obstruction was erected, constitutes a waiver of the right of abandonment on that ground. (Barrett v. Boddie, 158 Ill. 479; Saunders v. Fox, 178 Ill. App. 309.) In our opinion, therefore, the court properly entered judgment for the plaintiff.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

2181A.008

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE JONAS MCKENNA
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, A. Hansen and Carl
Hansen, from a judgment for \$1000.00 for rent due under a certain
lease, by the terms of which plaintiff leased the premises therein
described to defendants, from the first day of May, 1917, to the
thirtieth day of April, 1918, at a rental of \$25.00 per month.

It is stated that defendants vacated the said premises
before the expiration of the lease, and the said rental was
paid in full for the term in question, is an alleged
constitutive eviction on the part of plaintiff.

The alleged eviction consisted in the placing of an
obstruction in the alley, which shut off defendant's means of
egress and access through the rear entrance to the said premises.
This obstruction, the evidence shows, was erected during the month
of August, 1917. Defendants treated the premises as theirs up to
the time they had always paid the rent regularly and
amounts unpaid.

The mere complaint of an amounting to an eviction
constituted at most a constitutive one. The fact that the
defendants remained in possession for nearly two years after
the removal of the obstruction was erected, constituted a waiver of
the right of abandonment on their part. (Hansen v. Sodick,
111 Ill. App. 479; Hansen v. Sodick, 111 Ill. App. 480.) In our
opinion, therefore, the court properly entered judgment for
the plaintiff.

There being no error in the record which justified
a reversal, the judgment will be affirmed.

294 - 23639

L. C. H. ZEIGLER,
Appellant,

vs.

ANN WAHLIN,
Appellee.

213 I.A. 667

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant, a physician, brought suit to recover for medical services rendered, and medicine furnished, to defendant, at undisputed prices, amounting to \$94.64. Defendant put in a set-off for money paid plaintiff for other treatments and medicine, basing the same on an alleged parcel contract of guaranty to cure and a charge of fraud and deceit. Plaintiff denied the charge, which there was no evidence to support, also entry into such a contract, and pleaded the statute of frauds thereto.

Defendant testified in substance that on her consulting plaintiff as to her condition he told her she had dropsy, that she should take treatments every day for three months, and after that three times a week, that he could positively cure her if she followed his treatments, but that it would take twenty months to cure one in her condition. Upon such representations, she claims, she took his treatments and medicines for about twenty-three months, paying him money from time to time amounting to over nine hundred dollars, but was not cured.

While plaintiff testified that he made no such contract, yet we think defendant's own version of it indicates nothing more than a mere prophesy or opinion as to a cure, and is insufficient to show a guaranty or grounds for a set-off.

1861 A.D.

OF CHICAGO
MUNICIPAL COURT
APPEAL FROM

TRUNG THU VÀ ĐÓI NIỀM SẼN CHIA NHỮNG ĐÓI

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... ..

[illegible][illegible]

nothing more than a mere propensity to commit an act, and
as insufficient to show a propensity to commit an act.

This conclusion renders it unnecessary to consider whether the statute of frauds applied to the oral contract. While by its terms, to effect a cure required treatments and medicine for twenty months and not a less time, if an oral contract or collateral agreement of guaranty of a cure was entered into on that understanding, then it was clearly for a fixed period and not to be performed within a year, and thus coming within the statute of frauds could not be enforced, (Leavitt v. Stern, 159 Ill. 526). unless it comes within the exception where a contract has been fully performed on one side. But whether or not it comes within such exception by the fact that defendant did all she was required to do, there being no valid basis for the set-off shown by the evidence, and plaintiff's claim being undisputed, the court erred in overruling plaintiff's motion to direct a verdict in his favor for the amount claimed. The judgment, therefore, will be reversed and the cause remanded.

REVERSED AND REMANDED.

380 - 23725

THE T. WILCO COMPANY, a
corporation,
Appellant,

vs.

ROYAL INDEMNITY COMPANY,
a corporation,
Appellee.

213 I.A. 667

APPEAL FROM

CIRCUIT COURT OF

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action on a fidelity bond, as extended, given by appellee to indemnify plaintiff against loss through any act of fraud or dishonesty committed by its employe, Wm. E. Aten, while in the performance of his duties as cashier and head bookkeeper between April 1, 1913 and April 1, 1915.

The appeal is from a judgment in plaintiff's favor for \$169.86, the amount of the premiums it paid, with interest to date of verdict. Defendant did not question its liability therefor. The defense against liability on the bond is predicated upon the falsity of answers, claimed to be warranties, made in what is called the employer's statement submitted to defendant at its request prior to, and as a basis for, the execution of the bond. The verdict sustained the defense.

Said statement contains 17 questions for answer by the employer. The 12th to the 16th inclusive, together with the answers made thereto in behalf of plaintiff by its president, are as follows:

"12. Q. (a) At what intervals will applicant's books, accounts, stocks and securities be inspected and audited, and verified with funds on hand or in bank?

A. (a) 1st of each month.

Q. (d) By whom will above audits and inspections be made?

722 .A.16.13

10 35000 12 111

THE UNIVERSITY OF CHICAGO

[illegible]

The following are the names of the persons who were present at the meeting of the Board of Directors of the United States National Bank, held on the 1st day of January, 1900:

"18. (a) In some instances all witnesses, books, accounts, checks and receipts are destroyed, and verified with great care by the

4. (a) List of names.

Amittogani has all the eyes. 112w more or (b)

A. (d) W. M. Davis, Clerk.

13. Q. (a) When were applicant's accounts last examined?

A. (a) March 1st.

Q. (b) Were they at that time in every respect correct?

A. (b) Yes.

14. Q. (a) Has applicant always faithfully, honestly and punctually accounted to you for all moneys and property heretofore under his control or custody as your employe?

A. (a) Yes.

Q. (b) Are applicant's accounts at this date in every respect correct, and proper securities, property and funds on hand to balance his accounts?

A. (b) Yes.

15. Q. (a) Is applicant now in debt to you?

A. (a) No.

16. Q. Have you ever sustained loss through the dishonesty of anyone holding the position of the applicant, or holding a similar position?

A. No."

To this statement is appended the following:

"It is agreed that the above answers shall be warranties and shall constitute the basis of, and form a part of said bond applied for, or any other bond that may be executed by the Royal Indemnity Company to the undersigned upon applicant above named, in said position, or any renewal or continuation of such Bond.

Dated at Chicago, Ill., this 7th day of March, 1913.

(sgd) The T. Wilce Co.,
E. Harvey Wilce,
President."

(Seal)

The bond, after reciting the signing and delivery of said statement, expressly provides that it shall be a part of the bond or any continuation thereof, and that such statement or statements shall be deemed statements of the employer and warranties, and then proceeds:

SI 31.A. 667

RECEIVED

COUNTY COURT OF

COOK COUNTY.

IN WILL CO. 1913

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IN WILL CO. 1913

This is an action on a liability bond, as extended,
given by appellee to indemnify plaintiff against loss through
any and all fraud or dishonesty committed by the employee, who
is now, while in the performance of his duties as cashier
and bank bookkeeper between April 1, 1912 and April 1, 1913.
The issue is upon a judgment in plaintiff's
favor for \$100.00, the amount of the proceeds of said, with
interest to date of rendition. Defendant has not questioned the
liability therefor. The defense against liability on the
bond is predicated upon the falsity of answer, claimed to
be warranted, made in that he alleged the employee's statement
submitted to defendant as the receipt prior to, and as a basis
for, the execution of the bond. The verdict sustained the
defendant.

Said statement contains 17 questions for answer
by the employee. The first to the 16th inclusive, regarded
the answers made thereto in behalf of plaintiff by
the president, are as follows:

"17. Q. (a) at what intervals will employees' books, accounts, checks and securities be examined and audited, and verified with funds on hand or in bank?

A. (a) 100 of each month.

Q. (b) By whom will these audits and inspections

A. (d) W. M. Davis, Clerk.

13. Q. (a) When were applicant's accounts last examined?

A. (a) March 1st.

Q. (b) Were they at that time in every respect correct?

A. (b) Yes.

14. Q. (a) Has applicant always faithfully, honestly and punctually accounted to you for all moneys and property heretofore under his control or custody as your employee?

A. (a) Yes.

Q. (b) Are applicant's accounts at this date in every respect correct, and proper securities, property and funds on hand to balance his accounts?

A (b) Yes.

15. Q. (a) Is applicant now in debt to you?

A (a) No.

16. Q. Have you ever sustained loss through the dishonesty of anyone holding the position of the applicant, or holding a similar position?

A. No."

To this statement is appended the following:

"It is agreed that the above answers shall be warranties and shall constitute the basis of, and form a part of said bond applied for, or any other bond that may be executed by the Royal Indemnity Company to the undersigned upon applicant above named, in said position, or any renewal or continuation of such Bond.

Dated at Chicago, Ill., this 7th day of March, 1913.

(sgd) The T. Wilce Co.,
E. Harvey Wilce,
President."

(Seal)

The bond, after reciting the signing and delivery of said statement, expressly provides that it shall be a part of the bond or any continuation thereof, and that such statement or statements shall be deemed statements of the employer and warranties, and then proceeds:

Q. (a) W. A. Davis, Clerk.

Q. (a) When were applicant's accounts last examined?

A. (a) March 1st.

Q. (b) Were they at that time in good standing?

A. (b) Yes.

Q. (c) Has applicant always faithfully complied with the provisions of the Act? Has he ever been convicted of any crime?

A. (c) Yes.

Q. (d) Are applicant's accounts at this date in good standing? Are they correct, and proper?

A. (d) Yes.

Q. (e) Is applicant now in debt to any one?

A. (e) No.

Q. (f) Have you ever sustained loss through the insolvency of anyone holding the position of an agent, or holding a similar position?

A. (f) No.

To this statement is appended the following:

"It is agreed that the above answers shall be correct and shall constitute the basis of, and form part of, the bond required for, or any other bond that may be executed by the Royal Indemnity Company in the undersigned upon applicant above named, in said position, or any renewal or continuation of such bond. Witness my hand and seal of office, this 7th day of March, 1913.

(Sgd) The T. Wilson Co.,
E. Harvey Wilson,
President."

The bond, after reciting the statement and delivery of said statement, expressly provides that it shall be a part of the bond as any condition thereto, and that such statement be attached to the bond as a condition thereto.

"Now in consideration of the warranties aforesaid and of the payment of the premium of \$75, it is hereby agreed that, subject to the terms, conditions and limitations set forth in this bond, compliance with which shall be a condition precedent to the right of the employer to recover hereunder, the surety will make good to the employer" etc.

It appears from the evidence that prior to the making of such statement and to the issuance of the bond, Aten was guilty of defalcations amounting to over \$19,000, and during the period of insurance covered by the bond, of defalcations in excess of \$8,000. These facts were disclosed by audits of plaintiff's books made after April 13, 1914, when defendant was notified of a shortage in Aten's accounts. Previous audits of the books or of Aten's accounts had not been made, as stated in said answers, nor were they correct, as therein stated.

It matters not whether these answers and others proven to be untrue were not known by plaintiff to be untrue and were innocently made, as contended by appellant, if, as a matter of fact they were warranties and part of the contract sued on; and besides, as the answers assumed knowledge of the facts, plaintiff is precluded from alleging a want of knowledge on its part as an excuse for not answering correctly. (U. S. Fidelity & Guaranty Co. v. First National Bank, 233 Ill. 475; Hartford L. & A. Ins. Co. v. Gray et al., 91 id. 159; Norwayer v. Thuringia Ins. Co., 204 id. 334, 344; Cesena v. U. S. Life Endowment Co., 152 Ill. App. 653.)

That the employer's statement, so-called, or statements it contained, were a part of the contract and constituted warranties and not mere representations made on a mere request for information, as contended by appellant, seems so clear in view of the explicit language in both writings and the circumstances of their execution as not to require discussion. Such

statements are expressly declared in both writings to be warranties and a part of the bond, and their language and all the circumstances indicate a mutual intention that the two writings should constitute one agreement.

Much of the law cited by appellant would apply if the facts were as it contends, but the record does not support its contention. It is true that such statements, to be binding as warranties, must appear upon the face of the instrument itself or by reference be incorporated in the policy, and, if not, they are representations and not warranties. But more appropriate language for making such statements a part of the policy by reference could hardly be employed. As said in Spence v. Central Accident Ins. Co., 236 Ill. 444;

"The usual method adopted by insurance companies to make the statements and stipulations embraced in the application a part of the policy is to refer to the application and by express terms make it a part of the contract, or they are declared to be the basis upon which the contract is made, or the policy is declared to be issued upon the faith thereof. Where this course is pursued there is no room for doubt." (448)

This is equally applicable to a like reference in a fidelity bond to an employer's statement required as the basis thereof.

It is urged that the bond, being a sealed executory contract, could not be altered, changed or modified by parol agreement. The law to that effect will not be questioned, but it has no application to the facts at bar, if, as already stated, the employer's statement was by reference incorporated into the bond and made a part of it. And it might be added that the employer's statement so incorporated was also executed under seal.

It is urged that it required parol evidence to connect said statement with the bond and to identify it as the statement referred to therein. The evidence necessary so to identify it did not vary, contradict or add to the

statements are apparently included in both writings in the
 original and a part of the book, and these languages and all
 the circumstances indicate a written statement that the two
 writings were in connection with the same document.

None of the law cited by applicant would apply to it.

The facts were as it appeared, but the record does not support
 its conclusion. It is true that such statements, to be binding
 as contracts, must appear upon the face of the instrument itself
 or be otherwise incorporated in the policy, and it is not, they
 are not, and are not incorporated. But more importantly
 there is no making such statements a part of the policy by

reference to it, as in Case No. 10,000. It is said in Case No. 10,000
Insurance Co. v. The Life Ins. Co.

"The usual method adopted by insurance companies
 to make the statements and stipulations contained in the
 application a part of the policy is to refer to the
 application and by express terms make it a part of the
 policy, or they are deemed to be the policy when
 the contract is made, or the policy is delivered
 to be issued upon the facts stated. There is no
 contract is entered into in the case of the policy."

It is equally applicable to a like reference in a policy
 to an employer's statement referred to in the policy.

It is urged that the book, being a contract document

therefore, could not be altered, changed or modified by party

thereafter. The law is that effect will not be ascertained, but it

has no application to the facts of the case, it is already stated,

the employer's statement was by reference incorporated into the

policy and made a part of it, and it might be added that the

employer's statement is incorporated into the policy and

and.

It is urged that it required party evidence to

show that the statement with the book and so identify it as

the statement referred to therein. The evidence necessary

to identify it did not vary, contradictory or add to the

contract itself. The contract on its face does not purport to contain the whole agreement but expressly refers to an independent outside writing as a part of it, which was admissible in evidence under the well established rule that where the agreement is evidenced by more than one writing, all of them are to be read together and construed as one contract. (Gould v. Magnolia Metal Co., 207 Ill. 173.) We think the evidence received to identify the employer's statement referred to in the bond was admissible, and that the statements therein were material, and they being false, no matter how innocently made, and part of the contract, there can be no recovery on the policy. (See cases supra first cited.)

Appellant contends that proof of the employer's statement was not admissible under the pleadings. Plaintiff's declaration consisted of the common counts and two special counts on the bond, a copy of which, omitting the employer's statement, was attached. Defendant pleaded the general issue and gave notice thereunder of its defenses which were set out therein in detail, and which also set forth a copy of the employer's statement followed by an affidavit of merit. It is appellant's contention that defendant's reliance upon the statement referred to and attached to said notice was tantamount to denying the execution of the instrument sued on and that, therefore, defendant's plea should have been verified as required under section 52 of the Practice Act. Appellee did not undertake to deny the execution of the bond but merely to show that as pleaded it was not the entire contract between them. While the instrument sued on expressly refers to another writing, the employer's statement, and makes it a part thereof, it was not necessary that plaintiff should have set it out in the declaration, but it was necessary for defendant, in order to show a breach of the contract

entirely itself. The contract on 11th June was not made

in writing the whole agreement was expressly not to be

in writing and was made as a part of it, which was

admitted in evidence under the well established rule that

where the agreement is evidenced by more than one witness, all

of them are to be read together and construed as one agreement.

(Case v. Bessie Bessie, 207 111. 188.) To make the

agreement complete to identify the employer's statement referred to

it is the duty of the court to identify the statements referred to

and to identify the statements referred to, and to identify the statements

referred to, and to identify the statements referred to, and to identify the statements

referred to. (See Case v. Bessie Bessie.)

The court in Case v. Bessie Bessie found that the employer's

statement was not admissible under the above rule. Plaintiff's

testimony consisted of the common sense and the common

sense of the fact, a copy of which, entitled the employer's

statement, was attached. The court found that the common sense

and the common sense of the fact were not admissible under the

above rule in detail, and which also set forth a copy of the

employer's statement, followed by an affidavit of merit. It is

admitted that a statement that a statement was made by the

employer referred to and attached to said notice was submitted

to the court for the consideration of the fact that such an

affidavit, defendant's affidavit should have been verified as

required under section 22 of the Practice Act. Appellant did

not attempt to deny the execution of the bond but merely to

show that as claimed it was not the entire contract between

them. While the instrument used on employer's behalf to

another writing, the only one's statement, and hence it is

not correct, it was not necessary that plaintiff should

have had it in the declaration, but it was necessary

for defendant, in order to show a breach of the contract

going to avoid it to plead the document specially, as it did. To do so did not require a denial of the execution of the contract. Defendant did not attempt to deny the execution of the contract, (which, even as pleaded by plaintiff, embraced the employer's statement by reference) but merely relied upon the bond being void ab initio. In a similar case, Phoenix Ins. Co. v. Stocks et al., 149 Ill. 319, where the defense of a breach of warranties was also made, plaintiff declared on the policy, and defendant asked leave at the trial to file a plea setting out the application containing the warranties, which was refused. The Supreme Court said that had the plea been presented in due time the right to file it would have been unquestioned, and stated that it was a settled rule in this state that it is not necessary in an action on a policy for plaintiff either to allege or prove such matters as appear only in the application, but that their falsity or breach may be set up or proved by defendant as a matter of defense.

It is contended that proof was introduced by appellee under its plea incompetent to show a shortage in Aten's accounts prior to the making of said statement, that it was mere opinion evidence given by expert accountants or bookkeepers on matters not properly the subject of expert testimony.

While there may be some technical error we do not think it such as to call for a reversal, as there was sufficient competent evidence, in our opinion, to show fictitious entries and shortages in his accounts prior to that time. We deem it unnecessary to extend this opinion by an analysis of such evidence, and think that the testimony complained of comes within the rule that where books of account are voluminous and intricate resort may be had to the aid of an expert bookkeeper to explain the meaning of entries and the true state of accounts.

(Guaranty Co. v. Mutual Building & Loan Assn., 51 Ill. App. 254;

[illegible]

Reinke v. The Sanitary District of Chicago, 260 Ill. 380.)

Several instructions are complained of. So far as the criticisms involve appellant's construction of the contract sued on, and other points herein adversely decided, they need not be considered. Aside from such criticisms it is contended that three of the instructions given at defendant's instance were objectionable for singling out and giving prominence to special facts, and that the repetition of some of the same language in each of them, made them argumentative. Each of these instructions directed a verdict for defendant on the hypothesis that the jury should find from the evidence in substance that before the bond was issued and for the purpose of procuring it plaintiff, by its president, made and delivered to defendant such employer's statement containing a specific statement or answer set forth in the instruction that was not correct, and that prior thereto said Aten had appropriated to his own use the moneys and property of said plaintiff.

It follows from the views we have above expressed that upon such a hypothesis, (the instruction containing all essential elements of the defense) the court properly directed a verdict for defendant. The instructions differed in language in the main only as to the specific statement or answer incorporated therein from the employer's statement. That the jury could have disposed of the case on any one of these instructions did not deprive defendant of its right to the others, or render them argumentative or objectionably repetitious, even though they necessitated a repetition of most of the same elements stated in other instructions. It is probable that an attempt to state in one instruction the varying hypotheses on which a verdict could rest would have been far more confusing than the method adopted.

Nor are they subject to the criticism of giving

prominence to special facts, a criticism more frequently made of an instruction not directing a verdict. They are not like those criticized in Weston v. Teufel, 213 Ill. 281, which had the effect of eliminating one by one certain facts or circumstances from the consideration of the jury, nor like those criticized in Drainage Comrs. v. I. C. R. Co., 158 Ill. 353; West Chicago Street Ry. Co. v. Patters, 196 id. 298, and other cases cited by appellant where the instruction singled out for special comment particular portions of the evidence and told the jury that a certain conclusion did not follow therefrom as a matter of law. We find no error in the instructions.

The jury, disregarding a proper form of verdict for plaintiff submitted to it, returned a verdict in the following form:

"We, the jury find the issues for the plaintiff and assess the defendant's damages at the sum of \$150, with interest thereon from October 15, 1914, to date, amounting to \$19.86 and including costs of suit."

Before entering judgment the court corrected the verdict so as to read:

"We, the jury find the issues for the plaintiff, and assess the plaintiff's damages at the sum of \$169.86."

We think this was correcting a matter of mere form for which there was unquestioned authority. The amount of damages assessed corresponded to nothing in the evidence except the \$150 in premiums paid by plaintiff and the interest thereon, which the record shows defendant tendered after suit and for which a verdict could be found under the common counts sued on, as the jury was practically told in an instruction given in plaintiff's behalf. The record admits of no other conclusion than that it was the intent of the jury to give plaintiff a judgment against defendant for the amount so

assessed, and that through its want of technical knowledge it referred to the damages as defendant's instead of plaintiff's, which, under the circumstances, we deem a mere matter of form.

The judgment will be affirmed.

AFFIRMED.

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456 - 23801

PHILIP E. WALSH,
Appellee,

vs.

WEST BADEN SPRINGS COMPANY,
a corporation,
Appellant.

213 I.A. 668

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a personal injury case in which appellee (the plaintiff) obtained the judgment appealed from. He was the foreman of brick masons engaged in constructing the brick walls of a building defendant was erecting at West Baden, Indiana, and was injured in falling from or with a scaffold erected for their work, caused by the breaking of two cross pieces of 2 x 8 inch lumber about seven feet long, on which the flooring of the scaffold rested.

The original three counts of the declaration are predicated on defendant's alleged failure to furnish a reasonably safe scaffold on which to work, the third also alleging negligence in directing plaintiff to work thereon. Two additional counts are predicated on the same or similar allegations and two certain statutes of the State of Indiana, neither of which necessarily figures in the case from plaintiff's view point, and one of which is discussed by appellant as pertinent to the defense.

Whether plaintiff exercised or had any authority or duties in relation to the structure other than as foreman over his fellow masons in ordinary construction work, was a fact the jury had to determine from contradictory evidence, which it is fruitless to discuss if, as we think, there was

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This is a personal injury case in which the plaintiff obtained the judgment appealed from. He was the owner of a brick machine engaged in constructing the brick walls of a building contract was awarded at that time. He was injured in falling from or with a scaffold. He stated that his work caused him the removal of two cross pieces of 2 x 8 inch lumber about seven feet long, on which the scaffold was kept.

The original three counts of the declaration are predicated on defendant's alleged failure to furnish a reasonably safe scaffold on which to work, the third also alleging negligence in directing plaintiff to work thereon. The additional counts are predicated on the same or similar allegations and two certain statements of the state of Indiana, either of which necessarily appears in the case from plaintiff's view point, and one of which is disavowed by defendant as pertinent to the defense.

Whether plaintiff recovered or had any authority to enter in relation to the structure other than as foreman over his fellow men in ordinary construction work, and that the jury had no doubt from certain theory evidence, which it is entitled to discuss it, as we think, those who

sufficient evidence, deemed credible by the jury, from which it could reasonably find that plaintiff had no authority over the construction of the scaffold, no notice of its defects, and no relation that imposed upon him the duty of inspection.

The evidence strongly tended to show these to be the facts:

Plaintiff was hired by defendant as a mason foreman and as such had charge of the brick and concrete work and the setting of lintels or I-beams at the window tops to support the cap stones. The scaffolds on which he and his co-laborers worked were erected by carpenters hired by defendant, over whom he neither had nor exercised superintendence or control. As the mason work proceeded upward the carpenters built a new section of the scaffolding at higher levels for the masons to stand on and place their material. Each section of the scaffold on which the masons stood was designed to carry, and previous to the accident had carried, the masons thus engaged and the brick and mortar for immediate use, aggregating approximately 2200 lbs. in weight. The section which fell had not previous to the work engaged in at the time of the accident been subjected to use and no material had been placed on it. When it gave way plaintiff and three of his co-laborers were on it carrying an I-beam to be placed over the window top. The jury were justified in finding the weight of the evidence to be against defendant's contention that this was a negligent act on plaintiff's part and that the beam should have been raised by a derrick. A derrick was used by an independent contractor in setting stone, but plaintiff had no control or direction over it or his work. But even if he had it appears that the aggregate weight of the men and beam did not exceed 960 lbs., distributed over more than half of the section of the scaffold,

thus imposing less of a load than it was ordinarily designed to carry.

The cross pieces rested on two longitudinal pieces of lumber parallel to the wall. It was customary in such construction to support such cross pieces by knee braces, which was done at lower scaffold levels. The cross pieces that broke were not, however, thus supported and were cross-grained, the break following along the grain about 14 inches across these 2 x 8 inch pieces. Not only was there sufficient evidence from which the jury could find negligence in using unbraced pieces of that character to carry the weight ordinarily imposed on the scaffold, but also that such negligence was that of defendant's employees over whom plaintiff neither exercised nor had superintendence or control. In that respect, therefore, the evidence sustained the allegation of neglect to furnish a reasonably safe place to work, and supported plaintiff's cause of action unless the grounds urged by appellant were sufficient to defeat it.

Appellant urges that it was plaintiff's duty to inspect the scaffolding and that his failure to do so constituted contributory negligence. So far as the argument rests on the contention that appellee was general superintendent and therefore had direction of the carpenters who constructed the scaffold, the jury's finding thus supported by the evidence, was impliedly against it. Appellee, therefore, had a right to assume that defendant, through its carpenters, had discharged the duty cast upon it by law of providing a reasonably safe place for him to work, and to act on such assumption in the absence of actual knowledge or notice of any defects in the structure. (C. & A. R. R. Co. v. Maroney, 170 Ill. 520.) While it is also contended that there were certain incidents that charged him with such knowledge or notice, there was

was looking for a fact that it was actually intended to carry.

The great object was to see that the system

of law was applied to the work. It was necessary in order

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ample basis in the evidence for a different finding of fact.

But appellant argues that the Indiana statute imposes upon appellee a still greater duty than that which would otherwise rest upon him and required him to make such inspection. The statute, referred to as the Dangerous Occupation Act, approved March 6, 1911, 3862d Burns R. S. 1914 (Ind.), makes it the duty of all persons whatsoever engaged in the management, construction, erection, etc., of any building to see and require that all contrivances and everything whatsoever used therein, are carefully selected, inspected and tested, so as to detect and exclude defects and dangerous conditions, and that all scaffolding etc. are properly constructed, and makes it the duty of all owners, managers, operators, contractors and subcontractors, and all other persons having charge of, or responsible for any work, etc. involving risk or danger to employees, to use every device, care and precaution practicable, etc. Construing this act it was said in Leet v. Block, 182 Ind. 271, that "it was the purpose of the act to fix a higher standard of care on the person having the particular work in charge." If the jury were correct in finding that no duty devolved on appellee Walsh with respect to the construction of the scaffolding then the act would seem to have no application to him in this case. The court also said: "The initiative act does fix a high standard of care, a violation of which is negligence per se, but lays that care to the door of the person having the work in charge, and in consequence thereof the application of the enactment must be circumscribed to that particular source from which or from whom authority and control of the instrumentalities and individuals emanate."

As to alleged errors in rulings on evidence it is enough to say, we think, without setting forth the numerous

... basis is the evidence for a different finding of fact.

But applicant argues that the Indiana statute imposes

upon applicant a still greater duty than that which would otherwise

rest upon him and that it is an undue burden.

The statute, however, is not an undue burden.

Applicant's argument is, in effect, that the statute

is the work of all persons having knowledge of the facts

concerning the accident, and that it is an undue burden

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instances relied on, which would unnecessarily extend this opinion, that we find no reversible error. Nor can we say from an examination of the evidence that the verdict was excessive.

Errors are assigned in modifying and refusing instructions tendered by defendant. The modifications were made in instructions numbered 4, 12, 17, 18 and 21. That made in number 4, which told the jury that plaintiff could not recover if he adopted an unsafe or hazardous way in which to do his work, was properly modified, we think, by the qualification that he should know or in the exercise of ordinary care for his own safety should have known it to be unsafe or hazardous. The omission complained of from the 12th instruction, as tendered, is not essential to the statement of the law and was not calculated to enlighten the jury as to its application. What was stricken from the tendered instruction number 17 conflicted with the doctrine laid down in the Maroney case supra. The other modifications are too slight and inconsequential to mention.

Counsel merely asserts that there was error in refusing some 21 instructions tendered in behalf of defendant, but in what respect is not pointed out. While we are not required to search for error, a casual examination of the instructions, given and tendered, does not disclose manifest error in such refusals.

The judgment will be affirmed.

AFFIRMED.

472 - 23817

HARRIS TRUST & SAVINGS BANK,
Trustee,
Appellee,

vs.

J. ETHEL WHITEAN,
Appellant.

213 I.A. 668

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a case of forcible detainer, tried without a jury, in which the court's finding and judgment were for plaintiff's possession.

Plaintiff's evidence consisted of the written lease which provided for the payment of rent in monthly installments on the first of each and every month in advance, proof of possession by defendant under the lease when the suit was brought, and her failure to pay the rent for the month of March, 1917.

Defendant offered no evidence, and urges two grounds for reversal; (1) that as the lease gave the landlord an option to declare it ended for non-payment of rent it did not terminate by such non-payment without some affirmative act evidencing the landlord's intention so to terminate it, and (2) while the record shows the rent was not paid for such month it also shows a tender thereof.

As to the first point, it appears that by the terms of the lease the lessee waived any such notice and agreed that non-payment of rent would constitute a forfeiture of all rights under the lease, that possession thereafter would of itself without notice constitute a forcible de-

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tainer, so that notice of the landlord's intention was not necessary. Espen v. Hinsheliffe, 131 Ill. 468.

As to the second point it rests on the voluntary statement of plaintiff, injected into her testimony when called under section 33 of the Municipal Court Act, that the rent was "tendered", which was probably and properly deemed by the court a mere conclusion, it not being supported by any testimony of an actual tender and that it was kept good, which, if relied upon, defendant was bound to prove by competent evidence.

AFFIRMED.

subject, as well as the fact that the defendant's testimony was not
independent. People v. [redacted], 112 Cal. 2d 100.
It is the general rule that a witness is not competent to testify
as to the truth of a statement made by another person, unless the
statement is one of the kind which is admissible in evidence.
The rule is "absolute", which was established in People v. [redacted],
112 Cal. 2d 100. It is not enough that the statement is one of the
kind which is admissible in evidence, but it must also be one of the
kind which is admissible in evidence as to the truth of the statement.
It is the general rule that a witness is not competent to testify
as to the truth of a statement made by another person, unless the
statement is one of the kind which is admissible in evidence.
The rule is "absolute", which was established in People v. [redacted],
112 Cal. 2d 100.

WITNESS

[The following text is extremely faint and largely illegible due to the quality of the scan. It appears to be a list of names or a table of contents, but the specific details cannot be discerned.]

482 - 23826

MARGARET L. ARNOLD,
Appellee,

vs.

LONDON GUARANTEE & ACCIDENT
COMPANY, Limited, of London,
England,
Appellant.

213 I.A. 668

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$1544.06 in favor of appellee, who brought the action to recover on an insurance policy issued by appellant indemnifying her against direct loss by burglary, larceny or theft of certain property, including a diamond brooch and chain, which she claimed she lost by one of such methods May 12, 1913. The case was tried without a jury and it is conceded that only questions of fact are involved and that the main points at issue are, (1) was there a loss by theft or burglary, and (2) were proofs of the loss furnished to the defendant company. The arguments are confined to whether plaintiff manifestly failed to prove either of these essential conditions to recovery by a preponderance of evidence.

Plaintiff rested her case on her testimony alone. Her husband testified in rebuttal, but his testimony had no bearing on either of these issues except as it disclosed a doubt in his mind, during negotiations for a settlement, as to the cause of the jewelry's disappearance.

Defendant produced three witnesses who had conferred with Mrs. Arnold respecting such loss, Smith, superintendent of defendant's burglary department, Berger, its assistant general manager, and Blaul, a police officer who investigated

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...the defendant's burglary department, Denver, its assistant
general manager, and Blum, a police officer who investigated
with Mrs. Arnold respecting such loss, Smith, superintendent
of defendant produced three witnesses who had conferred
to the case of the jewelry's disappearance.
...in his mind, during negotiations for a settlement, as
...on either of these issues except as it disclosed a
...testified in rebuttal, but his testimony had no
...testify her case on her testimony alone.
...of these essential conditions to recovery by a preponderance of
...to whether plaintiff necessarily failed to prove right
...to the defendant company. The arguments are
...loss by theft or burglary, and (2) some proof of the
...and that the said points at issue are, (1) was
...a jury and it is conceded that only questions of fact
...by one of each method May 12, 1913. The case was tried
...diamond brooch and chain, which she claimed she
...other loss by burglary, larceny or theft of certain property,
...insurance policy issued by appellant indemnifying her against
...loss of apparel, she brought the action to recover on the
...this appeal is from a judgment for \$1000.00 in

the felonious charge; also a seamstress who was sewing in the afternoon of the jewelry's disappearance in the room whence Mrs. Arnold claimed it disappeared, and a representative of its legal department who conferred with Mr. Arnold respecting the institution of this suit by Mrs. Arnold.

The record discloses flat and irreconcilable contradictions between plaintiff's testimony and that of most of these witnesses upon material matters in controversy; and comparing the weight of her evidence with that against her it may be added that the contradictions, inconsistencies and evasive answers found in her testimony seriously impair its probative value.

Her account of the disappearance of the jewelry was substantially as follows: That in the afternoon in question a seamstress and young girl were sewing for her in her bedroom on the second floor of her residence; that she kept the brooch or pendant in a small lace bag in her trunk, and, needing some lace for the occasion, took it out of the bag and slipped it under a pillow, and later put it in the second or third drawer of her chiffonier - just which she was uncertain - slipping it under a lot of "trimmings and different things" in the back part of the drawer. She first said she slipped it under the pillow "for five minutes", and later, "for a short time", about half-past two, but finally testified that it was after four o'clock when she took it from under the pillow and placed it in the drawer. At that time the seamstress was still there but the young girl had left. The seamstress remained in the room until 6:45 p. m. Plaintiff testified that she left the room about 5 o'clock and returned to it about 8 o'clock when she discovered the disappearance of the pendant; that she and her second maid

then commenced to search through the drawers and various places for it. Her husband testified that on going to the room and inquiring where she placed it she said "under some stockings", which she testified were kept in the first drawer. She also testified that on her return to the room she found the drawers all "mussed up."

It is conceded in effect that no one of the household could have stolen the article between the hours of 4 and 8 o'clock, and that no one except the seamstress could have stolen it between 4 o'clock and the time she left. Some of plaintiff's testimony was manifestly calculated to support a suspicion, at least, that the seamstress took the jewelry. After the latter had taken the witness stand and denied in detail all knowledge of the article, plaintiff in rebuttal enlarged upon her version of the transaction and said, that when she took it from the pillow she told the seamstress "this is my jewelry, I must put it away" and that the seamstress saw the jewelry "box" and looked "straight at her" while she put it in the drawer. On the other hand, she said on cross examination, referring to a letter she had written a few weeks after the incident, asking the seamstress to do further work for her, "that does not look like I thought the girl stole it." Later she said "I am not accusing her." And when the seamstress was asked if she took the jewelry plaintiff's attorney objected on the ground that they had not charged that she did. While, therefore, suspicion was directed toward the seamstress, in view of these disclaimers and no complaint made as to the specific finding of the court that she did not steal the article, it was manifestly plaintiff's as well as the court's theory that the jewelry was taken by burglars in the hour following the seamstress' departure.

then commenced to search through the drawers and various places for it. Her husband testified that on going to the room and looking where the glasses is the only "under some clothing", which the testified were kept in the first drawer. She also testified that on her return to the room she found the drawers all closed up.

It is conceded in effect that no one of the household could have stolen the article between the hours of 4 and 8 o'clock and that no one except the defendant could have stolen it between 8 o'clock and the time she left. Some of plaintiff's testimony was manifestly calculated to support a conclusion, at least, that the defendant took the jewelry. After the latter had taken the witness stand and denied in detail all knowledge of the article, plaintiff in rebuttal enlarged upon her version of the transaction and said, that when she took it from the jewelry she told the defendant "this is my jewelry, I want it away" and that the defendant saw the jewelry "then" and looked "straight at her" while she put it in the drawer. On the other hand, she said on cross examination, referring to a letter she had written a few weeks after the incident, calling the defendant to go further west for her, "that does not look like I brought the girl into it." Later she said "I am not accusing her." And when the defendant was asked if she told the jewelry plaintiff's attorney objected on the ground that they had not charged that she did. While there was some discussion as to whether or not the question of these statements was admissible and as to whether or not the plaintiff at the time she did not intend to testify, it was manifestly plaintiff's as well as the court's theory that the jewelry was taken by defendant in the hour following the defendant's signature.

But aside from the "mailed" condition of the drawers - which defendant's witnesses, who had conferred with plaintiff about details, testified she did not mention before the trial - there was no evidence whatever tending to show a burglary. The policeman who went to the house and investigated the matter testified that he saw no way burglars could have climbed up from the outside, and there was no proof that the condition of any of the doors and windows was such that burglars could have entered them without forcing them in some manner, of which no trace was found, nor was there any evidence that a burglar could have entered the lower floor of the house and gone up stairs unobserved.

The case is not different, as to defective proof of the commission of a burglary or larceny, from several cases decided by the New York Supreme Court. (Schindler v. U. S. F. & G. Co., 109 N. Y. Supp. 723; Gordon v. Aetna Indem. Co., 116 id. 558; Goldstein v. Gen. Acct. F. & L. Assn. Corp., 157 id. 1142; 158 id. 867.) While there was proof of the disappearance of the article in each of the cited cases it was held by the court that there was no adequate proof of a burglary or larceny, which, there as here, constituted an essential condition of liability.

But whether there could be a legitimate inference of theft or burglary from the evidence adduced in plaintiff's behalf it devolved upon her to prove that she had complied with another condition of liability, by furnishing proof of the loss as required by the terms of the policy. The company had blank forms for that purpose covering several pages, one of which witness Smith testified was left with her to be filled out. She denied that one was left with her. Her version was that a day or two after the loss she saw witness Smith and at his

request signed a blank paper called by him a proof of loss, that she asked why she should sign a blank paper, that in reply he wanted to know if she doubted the integrity of the company, and that there was nothing on the paper to read, to her knowledge, except the headlines. The usual blank used for such purpose had four pages of printed questions. Not only did witness Smith deny her testimony on this matter but he testified that on more than one occasion he requested her to make proofs of loss and told her that as persons were often mistaken about such matters the company required a sworn statement as to the method of loss. She would not deny that he so told her but simply said she did not remember it. Mr. Berger, the assistant manager, also testified that when some months later she saw him with respect to the claim, on not finding proofs of loss in the files he also informed her that she should make a regular proof of claim and swear to it, stating to her as did witness Smith, that claimants were frequently mistaken about thefts and loath at times to swear to the claim. This she denied, but it was corroborated by witness Smith. The representative of the company's legal department testified that before the suit was brought he told her husband the same thing as to the absence of proof of loss. His testimony on this matter was not disputed. The detective's report to the company's officials indicated no proof of robbery, and they knew that the seamstress had been interviewed and had threatened suit if she was charged with theft. Under such circumstances it seems reasonable and probable that the company would have required compliance with the express provision of the policy that the claim for loss or damage "shall be made in writing duly certified to and shall set forth a statement in detail of the knowledge and belief of the assured as to the manner in which the loss

was sustained," and we think that there is a clear preponderance of evidence that the company's agents did insist upon the fulfillment of that requirement.

While defendant pleaded a failure to furnish such proof, thus making it an issuable fact, not only did plaintiff rest her case on her solitary statement of having signed a blank paper, but after the evidence was all in her attorney, evidently with little confidence in the probative value of her testimony when compared with the circumstances and the explicit testimony of defendant's witnesses on that point, sought to amend the pleadings by inserting a claim of waiver of the requirement and thus to change the issue of fact. Leave to amend was ultimately denied and the court specifically found that there was no waiver, and the argument here is not on the basis that there was but that the signed blank was accepted as written proof of the loss.

We think, therefore, that the finding of liability, which implied a finding that plaintiff furnished such proof of loss, was manifestly against the weight of the evidence, that plaintiff failed to show by a preponderance of evidence an essential condition to recovery, and, hence, the judgment must be reversed with the finding of fact that she did not comply with the condition of the policy requiring written proofs of the loss.

REVERSED WITH FINDING OF FACT.

was admitted, and we think there is a direct correspondence
 of evidence that the company's agents did insist upon the
 fulfillment of that policy.

While defendant pleaded a failure to furnish
 such proof, thus making it an inadmissible fact, not only did
 plaintiff rest her case on her solitary statement of having
 signed a check paper, but after the evidence was all in her
 favor, evidently with little confidence in the probative
 value of her testimony when compared with the circumstances
 and the explicit testimony of defendant's witness on that
 point, sought to amend the pleadings by inserting a claim of
 injury to the reputation and thus to change the issue of
 fact. Issue so amended was ultimately denied and the court
 specifically found that there was no injury, and the argument
 here is not on the basis that there was but that the alleged
 injury was recognized as without proof of the fact.
 We think, therefore, that the finding of liability,
 which implies a finding that plaintiff furnished such proof of
 fact, was manifestly against the weight of the evidence, that
 plaintiff failed to show by a preponderance of evidence an
 essential condition to recovery, and, hence, the judgment must
 be reversed with the finding of fact that she did not comply
 with the condition of the policy requiring written notice of
 loss.

THEY WERE REVERSED BY THE COURT.

FINDING OF FACT.

We find that Margaret L. Arnold, appellee, the assured in the policy sued on, failed to furnish the London Guarantee & Accident Co., a claim for loss or damage under the policy in writing duly subscribed and certified to, setting forth in detail all her knowledge and belief as to the manner in which the alleged loss was sustained, and thus failed to comply with a condition essential to recover under said policy.

41 - 23914

KARAZINA BOCHENEK,
Plaintiff in Error,

vs.

CATHOLIC ORDER OF FORESTERS,
a corporation,
Defendant in Error.

213 I.A. 668

ERROR TO

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff was a beneficiary under a certificate issued to one Orlow, a member of the defendant, a fraternal beneficiary society, whose death resulted from what was claimed by defendant, the appellee, to be an unlawful act on his part against the laws of the State of Illinois. In Orlow's application for membership, which formed a part of the contract between him and the defendant society, he agreed as follows:

"I further agree if my death shall be the result of any unlawful act on my part against the State, the sanctity of the home, or violation of morality, to waive all rights my beneficiaries, dependents or heirs at law may have by virtue of my membership in this order."

It is argued that said Orlow committed both the crime of burglary and of theft, and while engaged in the consummation of the crime and because of such crime was shot and, as a result thereof, died, wherefore defendant was not liable under the benefit certificate.

The facts constituting a prima facie case for plaintiff were not questioned, namely, the issuance of the certificate of membership, the furnishing of proofs of death to defendant, and the fact that it made no payment. Defendant made proof of the application of membership containing the stipulation aforesaid, of the coroner's verdict, and all

the circumstances of the shooting, showing beyond doubt that the death of the defendant resulted from a shot received while he was in the act of committing a burglary, or at least a theft. No evidence was received by way of rebuttal. That offered was rejected as immaterial and the propriety of the court's ruling thereon is not and cannot well be questioned. The only ground for error argued is that there was sufficient variance in the testimony offered by defendant to raise a reasonable doubt as to whether Orlow was in the act of committing a crime at the time he was shot. We have carefully reviewed the evidence and find nothing therein that reasonably tends to support any other inference than that he was killed while actually engaged if not in a burglary, at any rate in a theft, and that the shot from which he died was received while still engaged in the criminal act, namely, while carrying the stolen property from the premises. That being the case no question of fact was left open for the jury's consideration and the verdict was properly directed.

Plaintiff offered to show that the deceased had money in the bank and a good reputation as a law abiding citizen. It having been clearly established beyond a reasonable doubt that he was caught in the very act of committing the criminal offense charged, and neither his presence nor participation therein being a controverted fact, the rejected evidence had no tendency whatever to raise a doubt as to the guilt of the deceased or the question of liability.

The judgment will be affirmed.

AFFIRMED.

The statement of the shooting, showing beyond doubt that
the bullet of the defendant passed from a shot received while
he was in the act of committing a burglary, or at least a
crime. No evidence was received by way of rebuttal. This
evidence was rejected as immaterial and the propriety of the
jury's finding the case is not and cannot well be questioned.
The only ground for error argued is that there was sufficient
evidence in the testimony offered by defendant to raise a
reasonable doubt as to whether or not he was in the act of committing
a crime at the time he was shot. He has successfully rebutted the
evidence and that nothing remains that reasonably tends to
support any other inference than that he was killed while
committing a burglary. It was in a burglary, at any rate in a theft,
and that the shot from which he died was received while still
engaged in the criminal act, namely, while carrying the stolen
property from the premises. That being the case no question of
fact was left open for the jury's consideration and the verdict
was properly directed.

It is still argued to show that the deceased had money
in the bank and a good reputation as a law abiding citizen. It
having been already established beyond a reasonable doubt that
he was caught in the very act of committing the criminal offense
charged, and neither his previous nor postoffense character
being a controverted fact, the rejected evidence had no tendency
whatever to raise a doubt as to the guilt of the deceased or the
existence of liability.

The judgment will be affirmed.

ATTORNEYS.

RECEIVED
IN THE COURT
OF THE DISTRICT OF COLUMBIA
JAN 10 1901

RECEIVED
IN THE COURT
OF THE DISTRICT OF COLUMBIA
JAN 10 1901

72 - 23982

NATIONAL FIRE INSURANCE CO.,
a corp.,

Appellant,

vs.

UNITED GARAGE COMPANY,
a corp.,

Appellee.

213 I.A. 669

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action of replevin to recover an automobile. The case was tried without a jury, and there was a finding of right of possession in plaintiff but that the property was rightfully held by defendant for payment of \$53, not questioned as a fair and reasonable charge by defendant for storage of the automobile during 53 days when its whereabouts was unknown by plaintiff or its former owner.

The automobile was insured against theft by appellant, who, after its disappearance paid the insured a certain sum of money and became the owner thereof. It was found by a policeman abandoned in a public street and he took the same to appellee for storage, which claims a lien to the amount aforesaid under the lien act giving garage keepers a lien on any motor vehicle for the proper charges for keeping the same "at the request of the owner, or the person having the possession thereof." (See section 3a of the Lien Act as amended in 1917, Session Laws 1917, p. 567.)

The only question raised is whether the undisputed facts aforesaid bring the case within the statute. We think they do. The policeman presumably performed his duty when he removed the abandoned vehicle from the public street, and, in the absence of proof that there was any public place for storing it, also in storing it for safety until the

2131.A.669

RECEIVED THE INSURANCE CO.
APPELLANT
JAN 10 1937
OFFICE OF THE ATTORNEY GENERAL
STATE OF NEW YORK

THIS IS AN ORDER BY THE COURT TO RECOVER AN AUTO-
MOBILE. The case was tried without a jury, and there was a
verdict of \$1000.00 in favor of the plaintiff and that the
plaintiff was entitled to be paid by defendant the amount of
\$1000.00 and interest on a rate and reasonable charges by
attorney for costs of the automobile during 30 days when
the automobile was unknown by plaintiff or its former owner.
The automobile was known and used by
plaintiff, and after the disappearance paid the amount of
\$1000.00 of money and became the owner thereof. It was
found by a policeman abandoned in a public street and he took
it away as evidence for storage, which claims a lien to the
amount of \$1000.00 under the lien act giving Garage Owners
a lien on any motor vehicle for the proper charges for keeping
it and "at the request of the owner, on the person having
the possession thereof." (See section 56 of the Lien Act as
amended in 1917, Section Laws 1917, p. 567.)

The only question raised in whether the undisputed
facts establish that the case within the statute. We think
they do. The policeman presumably performed his duty when
he removed the abandoned vehicle from the public street,
and, in the absence of proof that there was any public place
the lien is also to operate as for a lien until the

owner could be found with one authorized to keep automobiles. Until the contrary appears the presumption obtains that he performed his official duty, and hence his possession of the automobile under such circumstances would be deemed in custodia legis, and it having been kept by appellee at the request of "the person having the possession thereof", as provided by statute, we think the case comes clearly within the provisions of the statute giving a lien for such keeping.

It is urged that there were marks of identification by which appellee might have ascertained who was the actual owner before the lapse of the 53 days, and that it was negligence on its part not to make inquiries as to its ownership. We do not consider it to have been the duty of the garage keeper to make such inquiry and investigation, but, if any one's, that of some officer of the law. Whose duty it was, if not defendant's, was not an issue in the case. The garage keeper stored the automobile at the request of one having the actual, and, for the time being, apparently rightful, possession of the property, and hence was entitled to its statutory lien. The judgment will be affirmed.

AFFIRMED.

[illegible]

95 - 24011

ALVIN H. REED,

Appellee,

vs.

CLARA D. FRENCH,

Appellant.

213 I.A. 669

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant for real estate commissions, claimed to have been earned in a transaction whereby appellant on certain terms sold her property to one Hackel, or exchanged it for his. Issue was taken on whether appellee was the procuring cause of the transaction. The verdict was against appellant and judgment for \$600.00 was entered thereon after a motion for a new trial was overruled.

Only one question is presented for our consideration, - was the verdict clearly against the preponderance of the evidence? We think it was. Disregarding contradictory evidence on other points that required submission of the case to the jury, the following facts stand out either uncontroverted or at least supported by a clear preponderance of the evidence.

The property in question was listed with various agents, including appellee and one Geary, for sale or exchange. Both of them had received substantially the same figures and terms from Hackel and had submitted them to appellant and shown her his property. To both of them she stated that Hackel's price was too high and would not be entertained. Appellee made no further efforts to resume negotiations and the record discloses nothing in the nature of fraud, misconduct or fault on the part of appellant that caused him to abandon further efforts. On the other hand, Geary pursued his efforts until they resulted in a change of terms and consummation of the

222 A.T.E.

1944. 1945. 1946. 1947. 1948. 1949. 1950. 1951. 1952. 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581. 2582. 2583. 2584. 2585. 2586. 2587. 2588. 2589. 2590. 2591. 2592. 2593. 2594. 2595. 2596. 2597. 2598. 2599. 2600. 2601. 2602. 2603. 2604. 2605. 2606. 2607. 2608. 2609. 2610. 2611. 2612. 2613. 2614. 2615. 2616. 2617. 2618. 2619. 2620. 2621. 2622. 2623. 2624. 2625. 26

1. The vessel was sighted on the 1st of May, 1941, at 10:30 a.m. by the U.S. Navy ship, USS "Albatross" (AG-42), while on a patrol mission in the North Atlantic. The vessel was a small, fast-moving craft, approximately 30 feet in length, with a dark hull and a light-colored superstructure. It was moving in a southerly direction at a speed of about 15 knots. The vessel was observed for about 10 minutes before it disappeared below the horizon.

- The question is whether or not the evidence is sufficient to establish the guilt of the defendant.

The property in question was listed with various owners, including Appleton and one Gentry, for sale or exchange. It was then received substantially the same figure and then from Hensel and was submitted them to Appleton and shown for his property. To both of them was stated that Hensel's price was too high and would not be accepted. Appleton made further efforts to resume negotiations and the record discloses nothing in the nature of fraud, misstatement or fault on the part of Appleton that caused him to abandon further efforts. On the other hand, Gentry pursued his efforts until they resulted in a transfer of town and condemnation of the

deal, one of the chief influences in which was his efforts in securing for Hackel a cash purchaser of appellant's property if the deal was made, which the latter made a prerequisite thereof, and also efforts in procuring a change to terms that appellant was willing to accept. In the face of these facts it cannot be said that appellee was the procuring and efficient cause of the sale even though he was the first to submit terms to appellant, or even though Geary acquired information of his attempted negotiations before undertaking to bring the parties together on different terms. As said in Bergman v. First Swedish E. & L. Assn., 169 Ill. App. 329, "it is not the broker who first speaks of the property, but he who is the procuring cause of the sale, be he the first or second to engage the attention of the purchaser" that is entitled to the commissions.

We think the judgment should be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

that, one of the chief influences in which was his of even in
concerning the fact that a cash purchase was appellant's property
it was held that, which the latter made a promissory note
thereby, and also efforts in procuring a change to some other
appellant was willing to accept. In the face of these facts
it cannot be said that appellant was the purchaser of the property
since at the sale even though he was the first to submit
proof to appellant, or even though he had procured information
of the attempted sale before appellant had been notified of
the sale, he was not the purchaser. As said in Wright v. Wright,
121 Ky. 100, 121 Ky. 100, 121 Ky. 100, "it is not the
person who first offers of the property, but he who is the
person who is the first to accept, or he who is the first to
accept the offer of the purchaser" that is entitled to
the property.

It is not the person who is the first to accept, or he who is the first to
accept the offer of the purchaser" that is entitled to
the property.

It is not the person who is the first to accept, or he who is the first to
accept the offer of the purchaser" that is entitled to
the property.

Wright v. Wright, 121 Ky. 100, 121 Ky. 100, 121 Ky. 100

Wright v. Wright, 121 Ky. 100, 121 Ky. 100, 121 Ky. 100

Wright v. Wright, 121 Ky. 100, 121 Ky. 100, 121 Ky. 100

Wright v. Wright, 121 Ky. 100, 121 Ky. 100, 121 Ky. 100

95 - 24011

FINDING OF FACT.

We find that appellee, Alvin H. Reed, was not the procuring and efficient cause of the sale or exchange of appellant's property in question for which he seeks in this action to recover commissions and, therefore, has no cause of action therefor.

THE
OFFICE OF THE
ATTORNEY GENERAL
STATE OF NEW YORK
ALBANY

IN SENATE

REPORT
OF THE
COMMISSIONER OF THE
LAND OFFICE
IN RESPONSE TO A
RESOLUTION PASSED
BY THE SENATE
MAY 1, 1907

120 - 24039

MRS. MARGARET CHRISTY,
Plaintiff in Error,

213 I.A. 669

vs.

WHITE EAGLE BREWING COMPANY,
a corp.,
Defendant in Error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error sued defendant in error on its guaranty of a lease demising premises consisting of a lot 25 x 100 ft., with a two-story building 25 x 60 ft., fronting a street at one end of the lot, and a cottage partitioned into rooms and fronting a street at the other end of the lot, "to be used as a saloon, store and dwelling, and for no other purpose" for a period of five years from May 1, 1915. The defendant interposed the plea of ultra vires, and upon the hearing before the court it was upheld.

The premises became vacant in April, 1917, and the suit was brought to recover the installments of rent due the following first of May and first of June. By recognized right of assignment different tenants occupied the premises under the lease in which each conducted a saloon, and, in addition to bottled beer bought from defendant, sold whiskey, wines, draft beer, tobacco and soft drinks bought from others. Only a portion of the premises was used for saloon purposes, a part of the lower or store floor of the two-story building. The upper story was used for living or rooming purposes and the rest of the building and cottage was adapted for such purposes although one of the later tenants converted the latter into a dance or lodge room with a view of helping the saloon business.

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137

1. *Journal of the American Medical Association*, 1910, 55, 1000.

ALL IN INTEREST OF THE PEOPLE OF THE UNITED STATES

For a 70 year old man, he is in excellent health and is a very active person.

[illegible]

and, SERI, I will work away with to balance a well "balanced"

While each of the tenants verbally agreed to, and did buy bottled beer from defendant, but not exclusively, the arrangement seems to have been a mere voluntary one on their part which could be terminated at any time without incurring any obligation to defendant.

Defendant was chartered "to engage in the manufacture and sale of lager beer and other fermented liquors", and the question presented is whether the execution of such guaranty by its president, was, under such circumstances within the implied powers of the corporation.

It was said in Fritze v. Equitable B. & L. Society, 186 Ill. 183:

"By implied power is meant one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has slight or remote relation to it."

In East Brewing Co. v. Klassen, 185 id. 37, the court said:

"What is and what is not too remote must be determined according to the facts of each case. The rule has been stated to be: In exercising powers conferred by its charter, a corporation 'may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business.'"

Applying these doctrines the court upheld the plea of ultra vires in U. S. Brewing Co. v. Dolese & Shepard, 259 id. 274, where in order to promote the sale of its beer the Brewing Company agreed to erect for and lease from the Dolese & Shepard Co., a building to be used as a boarding house and saloon. The court said that "more than three-fourths of the building and all of the investment for its construction was for boarding house purposes, which was a business plaintiff had no power, either express or implied, to engage in."

The facts in the instant case are somewhat analogous in that only a small part of the premises was devoted to saloon purposes and the rest was constructed for, and contemplated to

Will each of these elements add to the

but which could be furnished at any time without incurring any obligation to deliver.

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1. The first of these is the fact that the Government has been unable to secure the necessary funds to carry out its policy. This is due to the fact that the Government has been unable to secure the necessary funds to carry out its policy.

These books are the only ones of the kind.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

There in order to promote the sale of the beer the Brewing Company agreed to erect for and lease from the Police a "Brewery Building" a building to be used as a public house and saloon. The Police said that "more than three-fourths of the building and all of the investment for its construction was for drinking saloon purposes, which was a business enterprise and no part of the investment or limited to common law."

The first of the two main points in the report is that the only way to get the best out of the system was to have a high level of control and to have a high level of control over the system. The second point is that the only way to get the best out of the system was to have a high level of control and to have a high level of control over the system.

be used either for store or dwelling purposes, uses outside the scope of defendant's business. If used for such purposes alone, as they might be if the tenant ceased to conduct a saloon therein, the guaranty could not reasonably be regarded as adapted to further the purpose for which defendant was organized. It was too remote from its general purposes. If any tenant saw fit (as ultimately was the case) to abandon his lease defendant had neither any recourse against him nor right to possession of the premises, but under the terms of the guaranty would be liable for a term of years upon the covenants to pay rent, even though the premises were used merely for a store or dwelling purposes. The case at bar is unlike some cases cited by plaintiff in error where the guaranty was executed in consideration of an enforceable promise to buy the guarantor's beer under circumstances calculated to promote its legitimate business. We think the court was correct in holding under the circumstances that the contract of guaranty was ultra vires and not reasonably calculated of itself to promote the Brewery's business.

AFFIRMED.

GEORGE T. MATTHEWS,
Appellee,

vs.

HUBBARD FILM MANUFACTURING
COMPANY, a corporation, and
WALLACE F. BEERY.

On Appeal of HUBBARD FILM
MANUFACTURING COMPANY, a corp..
Appellant.

213 I.A. 669

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE BARRELL DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was entered on a verdict for \$7500.00 against appellant (sole defendant at trial) in a personal injury case brought by appellee, and the main question presented and argued is whether the evidence warranted finding defendant liable for the negligence of one of its employes under the circumstances of the case.

These seem to be uncontroverted facts:

Defendant is the producer of motion pictures, having a studio and factory in Chicago. One Beery was in its employ to direct and superintend their production. Often the scenes were laid and the pictures taken outside of Chicago. On such occasions Beery and other employes of the defendant under his direction went to the place of production by automobiles usually furnished and hired by defendant. On the occasion in question he was using and driving his own automobile and negligently ran into plaintiff and injured him. While so driving he was leading the way for other automobiles carrying defendant's employes to the place where he was to direct the production of a picture. Defendant, through its president and manager, had previously directed Beery not to use his own automobile in

ST. ALBANS

its business and to remove therefrom the word "Essanay". Beery disregarded the instruction, and the question arises whether at the time of the accident it can be said that he was not acting within the scope of his employment, because driving his own automobile contrary to the master's instructions.

It is urged by appellant that the record does not affirmatively show that defendant was charged with knowledge that Beery used or was going to use his automobile on such occasion, or that it even impliedly assented thereto, and that on that occasion Beery did not start from defendant's plant but from some other point outside of it, where he was joined by defendant's other employees, who started from the plant but whom he led to the point of destination. We regard none of these points as controlling. From whatever place he started and whether or not defendant knew of the method he took to reach his destination it was certainly within the scope of his employment to take the trip, and in accordance with defendant's plan to go by automobile, whether his or another's, or he or somebody else drove it. The real question seems to be whether the fact that he disobeyed his master's directions in driving his own car removed him for the time being out of the sphere of his employment. The doctrine on this subject is summarized in Cyc. Vol. 26, p. 1535, as follows:

"The fact that a servant, while engaged on the business of his master, deviates from the master's instructions, does not, of itself, make the act outside of the scope of the servant's employment, so as to absolve the master of liability. Likewise a particular act of the servant's may be within the scope of his employment, although it violates the express instructions or orders of the master."

(See also Shearman and Redfield on Negligence, 6th Ed. Vol. 1, Sec. 146; Cooley on Torts, Student's Ed. p. 492; Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481 and authorities there

It is known and to remove the same, thereby, to
discontinue the investigation, and the question arises whether
as the fact of the subject is not yet established, he was not
within the scope of his employment, because arriving
his was necessarily contrary to the master's instructions.
It is argued by appellant that the record does not
show that defendant was charged with investigation
that party was not going to use his automobile in such
manner, so that it even implicitly accepted thereof, and that
as that section Henry did not come from defendant's plant
but from some other point outside of it, where he was taking
to defendant's other employees, who passed from the plant but
that he was to the point of destination. He argued that
that which he was doing, from whatever place he started
and whether or not defendant knew of the matter he took to
be his business. It was certainly within the scope of his
employment to take the logs, and in accordance with defendant's
plan to go by automobile, whether his or another's, or to go
anywhere else there is. The real question seems to be whether
it is that he discharged his master's duty in driving
the car and removed him from the place out of the scope
of his employment. The doctrine on this subject is established
in the following cases:

"The fact that a servant, while engaged on
the business of his master, deviates from the
master's instructions, does not, of itself, make
the act outside of the scope of the servant's
employment, so as to deprive the master of the
liability. It is a question of fact, and the
master's duty is to be ascertained from the
circumstances of the case. In the case of
a servant who is engaged in the business of his
master, the fact that he deviates from the
master's instructions, does not, of itself, make
the act outside of the scope of the servant's
employment, so as to deprive the master of the
liability. It is a question of fact, and the
master's duty is to be ascertained from the
circumstances of the case."

(See also *Johnson and Smith v. Johnson*, 101 N.W. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

cited; Toledo Wab. & West. Ry. Co. v. Harmon, 47 Ill. 298.)

It was said in Reedy v. Howe, 72 Ill. 133 -

"If the tort is committed by the agent in the course of his employment, while pursuing the business of his principal, and is not a willful departure from such employment and business, the principal is liable, although done without his knowledge."

We think the jury were warranted in finding that Beery, though driving contrary to his master's direction, was nevertheless acting within the sphere of his employment and that the rule of respondent superior applies.

What we have said dispenses with the necessity of considering the refusal of the court to direct a verdict for defendant on its motion. Unquestionably there was evidence tending to support plaintiff's case that required its submission to the jury. The judgment will be affirmed.

AFFIRMED.

called: Exhibit No. 2 (see page 10 of the report).

It was said in Exhibit No. 2 (see page 10 of the report).

The fact is pointed out in the report that the source of the material which was given to the committee of the government, and it was a matter of fact that the committee of the government was not satisfied with the material which was given to them.

It is stated that the fact was mentioned in the report that the committee of the government was not satisfied with the material which was given to them. The committee of the government was not satisfied with the material which was given to them. The committee of the government was not satisfied with the material which was given to them.

It is stated that the fact was mentioned in the report that the committee of the government was not satisfied with the material which was given to them. The committee of the government was not satisfied with the material which was given to them. The committee of the government was not satisfied with the material which was given to them.

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APPENDIX.

PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

vs.

H. CLIFTON JOHNSON,
Plaintiff in Error.

213 I.A. 669

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question involved in this record is whether or not the evidence was sufficient to support the finding of guilt under an information charging plaintiff in error with contributing to the delinquency of the prosecuting witness, a girl 16 years of age. The case was heard before the court without a jury, and we are not persuaded either by the argument or evidence, which we have carefully reviewed, that we should change the court's finding. As might be expected in such a case, the evidence is conflicting, but we think the testimony of the prosecuting witness is neither unreasonable nor improbable, and that defendant's letter to her written after the acts complained of, tends strongly to corroborate her version of the facts, if the court saw fit not to accept defendant's explanation of it. It is a case which depended much upon the credibility of the witnesses, for the determination of which the trial judge possessed advantages that do not accompany a dry record of the evidence. We think it unnecessary to enter into an analysis of the conflicting testimony in order to justify the court's conclusion. The judgment will be affirmed.

AFFIRMED.

EXHIBIT 100

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158 - 24078

WILLIAM J. DEVINE,
Appellant,

vs.

ABRAHAM J. VAN KENHUIS,
Appellee.

213 I.A. 670

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant brought suit to recover damages to his automobile caused by a collision with appellee's. The case was tried without a jury and the court found that both parties were negligent. We concur in the finding. The evidence showed that both parties were driving at an unlawful rate of speed and that had either one of them kept within the speed limits there would probably have been no collision. The street was covered with ice which was more or less rutty on the outsides of the street and smooth in its center. Appellant's car was going south at a speed of about 18 to 20 miles an hour and appellee's north at a speed of 10 to 15 miles according to the driver, and nearer 30 miles according to the driver of appellant's car. Appellee's car had skid chains on the rear wheels and appellant's did not. The evidence tended to show that appellant's car, as it approached, was skidding on the icy street, and that appellee's chauffeur, on noticing the fact, put on his brake to avoid a possible collision, when his car struck a rut and also skidded, swinging it to the opposite side of the street. Appellant's car slowed down to a speed of from 14 to 15 miles an hour at the time of the collision, the driver fearing to put on his

brakes lest his car too would skid. Under such circumstances we think the court's finding was correct. Each of the parties was bound to exercise ordinary and reasonable care to keep his car under control so as to avoid a collision with the other, especially at a time when the condition of the street rendered a collision more or less probable if when driving at a high rate of speed he attempted to use his brake. The judgment will be affirmed.

AFFIRMED.

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... will be ...

21 - 23504

EMMA HUPE, LENA HALTRY,
MARY GINDER and BERTHA
BRUCKNER,

Plaintiffs in Error,

vs.

REKA HILT et al.,
Defendants in Error.

(315a)
213 I.A. 670

ERROR TO

CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error seek to reverse a decree of the Circuit Court of Cook County which dismissed their bill in Chancery to set aside the will of Augusta Klein. They are the daughters of said Augusta and in their bill charge that she lacked mental capacity to make the will and that she was unduly influenced to make it by defendants in error Reka Hilt and her husband, Peter Hilt.

Augusta Klein died July 3, 1915, leaving her surviving besides complainants, her husband, Mathias Klein, and her daughters Rosa Klein, Bertha Bruckner and Reka Hilt. The will in question was executed by her May 27, 1914. It was admitted to probate in the Probate Court of Cook County September 15, 1915. It disposed of an estate of about \$10,000. The Circuit Court according to the usual practice first heard the testimony of the proponents of the will, then that of the contestants. At the conclusion of the evidence for the contestants the court instructed the jury to find the issues for the proponents of the will. This instruction together with the refusal to receive evidence offered are the principal matters urged as error.

While the bill alleged mental incapacity, there was no proof whatever of it, and we do not understand that plaintiffs in error so claim.

31.A.880

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As stated in Hettick v. Searcy, 278 Ill. 121, "The motion to direct a verdict presented the question whether there was any evidence, considered in its most favorable aspect, aided by all reasonable inferences which might be drawn therefrom, fairly tending to prove the issues." In considering that evidence the contestants are entitled to the benefit of all the evidence in their favor introduced by both parties. Lloyd v. Rush, 273 Ill. 489; Yess v. Yess, 255 Ill. 414. The evidence received and offered tended to establish in behalf of contestants these facts: The testatrix at the time of the execution of the will was about 72 years of age. About two weeks prior thereto she in company with Peter Hilt, who was her son-in-law, and his wife, went to the office of the Commercial Bank at Blue Island. There she met and talked with Christian Krueger, the cashier. Krueger at that time was negotiating with the Hilt with a view to selling them certain property. He called on them at their home with reference thereto and there became acquainted with the testatrix. When the testatrix called upon Krueger, Peter Hilt told him that she had some business she wanted to transact with him. She then said to him that she had made a will which she wished to change on account of a mistake in one word. She had described a person named in it as a niece, who was in fact a granddaughter. Krueger told her that if she would bring it up he would redraw it for her. Some six or seven days later the testatrix came to his office alone. He had his stenographer redraw the will, making this correction. She took away both the old and the new wills and on the next day or evening came back and told Krueger that she had looked it over and that she was satisfied with it. He then called in the witnesses to attest it.

At this time she was living with Peter Hilt and his

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wife. Prior thereto she owned a farm and operated it. Upon going to live with the Hilt she sold this farm to Cook County. The negotiations with the County Commissioners which extended over some two or three years were in part conducted by Peter Hilt, who was present with the testatrix and her husband at almost all the negotiations.

The evidence tends to show that the testatrix felt under great obligations to the Hilt. She said at one time if she did not have her two daughters, Reka Hilt and Rosa Klein, she would have to starve sometimes; that but for them she would have suffered sometimes for hunger and not have anything to wear. The evidence also showed that for the last two or three years of her life she was seriously sick a good bit of the time and under the doctor's care most of it.

In addition to these established facts, the contestants offered to show by the testimony of one Zacharias, that on February 12, 1914, Peter Hilt deposited in the Commercial Bank \$825.00 of the money of testatrix which she had drawn from the National Bank of the Republic on the preceding day and given into the possession of Peter Hilt, and that he was present with the testatrix when the money was drawn out. That this money was not inventoried in the estate of Augusta Klein until after citation proceedings in the Probate Court. They further offered to show that complainants worked upon the farm and contributed their shares toward the accumulation of the property. That they performed the household and manual labor on the farm during their youth and until they were married and moved away.

Contestants further called Peter Hilt as a witness and offered to show by him that the will in question was drawn by an attorney retained by said witness and under his direction; also the transaction of February 12, 1914, as above set forth.

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in addition to these established facts, the respondents offered to show by the testimony of one Bachman, that on January 12, 1914, when the defendant in the Commercial Bank deposit at the money of defendant which was paid from the National Bank of the Republic on the preceding day and given to the defendant of Bank Hill, and that he was present with the defendant when the money was drawn out. That said money was not deposited in the name of August Klein until after the defendant's death in the Probate Court. They further offered to show that Bachman worked upon the farm and contributed their money toward the accumulation of the property. That they

They further offered to show by Peter and other witnesses that on March 30, 1914, the testatrix signed in Peter Hilt's house, two typewritten instruments which were prepared at the instance of Peter Hilt, whereby the testatrix purported to give \$2000 each to Reka Hilt and Rosa Klein; that these instruments were executed in Peter Hilt's presence and the money there handed over to Reka Hilt and Rosa Klein. They further offered to show that on the day of the death of testatrix, Peter Hilt engaged in a fistic encounter with the husband of the testatrix who thereafter ceased to live with, or be cared for by the said Peter Hilt. They also offered to show that Peter took an active part in the sale of testatrix's farm to the County.

Objections were made to the evidence offered in behalf of contestants and in each case sustained by the court. If it had been admitted and considered in its most favorable aspect for contestants and aided by all reasonable inferences we do not think it could reasonably be said to fairly tend to prove the issues in favor of contestants.

The execution of the will at the bank in Blue Island was shown to be solely for the purpose of correcting an error in the name of a single beneficiary. It did not change the distribution to be made. When the previous will was executed, or under what circumstances, there is no evidence in the record, nor is there any attempt or offer to show that the matters and things which contestants desired to prove, had any connection whatever with the execution of the prior will, or the distribution to be made under either of them.

As was said in Thompson v. Bennett, 194 Ill. 57, "Undue influence, which will justify the setting aside of a will, must be such as to deprive the testator of his or her

They further offered to show by Peter and other witnesses that on March 30, 1934, the testamentary signed in Peter Hill's house, two typewritten instruments which were prepared at the instance of Peter Hill whereby the testamentary property in five \$5000 each to Peter Hill and Helen Hester; that these instruments were executed in Peter Hill's presence and the same were handed over to Peter Hill and Helen Hester. They further offered to show that on the day of the death of Peter Hill engaged in a fishing excursion with the husband of the testatrix who immediately came to live with her as shown by the said Peter Hill. They also offered to show that Peter Hill an active part in the sale of testamentary property to the family.

Witnesses were made to the evidence offered in support of testamentary and in each case sustained by the court. It is now admitted and conceded in its most favorable aspect for contestants and aided by all reasonable inferences we do not think it could reasonably be said as fairly held to give the issues in favor of contestants.

The execution of the will of the testatrix in this case was shown to be solely for the purpose of converting an error in the name of a single beneficiary. It did not change the testamentary to be made. When the previous will was executed, in order that circumstances, there is no evidence in the record, nor is there any attempt or offer to show that the testatrix and things which contestants desired to prove, had any connection whatever with the execution of the prior will, or the distribution to be made under either of them.

As was said in Thompson v. Bennett, 104 Ill. 27, "Under influence, which will justify the setting aside of a will, must be such as to deprive the testator of his or her

free agency." And in Moriarity v. Palmer, 286 Ill. 99, it is said it also must "be directly connected with the execution of the will and be operative when it is made."

Peter Hilt was named as the executor of the will and trustee of the estate, and appellant argues that the facts bring the case within the rule laid down in Gum v. Reep, 275 Ill. 505, and Teter v. Spooner, 279 Ill. 39, to the effect that "where a fiduciary relation exists between the testator and a devisee who receives a substantial benefit from the will, and where the testator is the dependant, and the devisee the dominant party, and the testator therefore reposes trust and confidence in the devisee, * * * and where the will is written or its preparation procured by that beneficiary, proof of these facts establishes prima facie the charge that the execution of the will was the result of undue influence exercised by that beneficiary, and this proof, standing alone and undisputed by other proof, entitles contestants to a verdict."

We think the proof received and offered falls short of establishing such fiduciary relationship; that it also fails to establish that testatrix was the dependant and Peter Hilt the dominant party, that it also fails to establish that the will was written by, or its preparation procured by him. The evidence was wholly insufficient to establish facts from which a jury might reasonably find that the will was not the will of the testatrix.

The decree will be affirmed.

AFFIRMED.

...and in Monterey v. Palmer, 388 Ill. 39, 22 Is
will it also must be directly connected with the execution of
the will and be operative when it is made."

Before Will was named as the executor of the will and
trustee of the estate, and appellant argues that the will
the law within the rule laid down in Quinn v. Quinn, 379 Ill. 505,
and Quinn v. Quinn, 379 Ill. 505, so the effect that "there is
immediately related exists between the testator and a devisee
and receives a substantial benefit from the will, and where the
testator in the document, and the devisee the testamentary
and the testator himself upon trust and confidence in the
testator, and where the will is written in its preparation
procured by that beneficiary, proof of these facts establishes
prima facie the change that the execution of the will was the
result of undue influence exerted by that beneficiary, and
this proof, standing alone and uncontradicted by other proof,

is sufficient to constitute a verdict."
We think the proof presented and offered tends to show
it establishing such fiduciary relationship; that it also
tends to establish that testatrix was the dominant and Peter
was the dependent party, that it also tends to establish that
the will was written by, or its preparation procured by him.
The evidence was wholly insufficient to establish facts from
which a jury might reasonably find that the will was not the

The decree will be affirmed.

161 - 24081

GEORGE I. KREMER,
Appellee,

vs.

CAREY BRICK COMPANY,
a corporation,
Appellant.

213 I.A. 670

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant was sued for money had and received on account of an alleged overcharge on brick furnished by it for the construction of three flat buildings. The court found for the plaintiff in the sum of \$190.00 and entered judgment.

The material facts are that in the year 1916, plaintiff, appellee, owned three lots which he desired to improve. To that end he obtained a loan thereon from the American Bond and Mortgage Company, the proceeds of which were left with the company for disbursement by it as the building progressed. He also made a general contract with one Iverson to erect these buildings. On August 31, 1916, Iverson filed with the loan company an affidavit which purported to set forth the names of all firms or persons with whom he had made subcontracts for labor or material. Therein he included the name of appellant company as having a subcontract to furnish common brick to the amount of \$1230.00. A few days thereafter the plaintiff and the contractor went to the office of the defendant company and made arrangements to have the brick furnished at the price of \$7.00 per thousand. The bricks were ordered by the contractor in his own name and he at that time stated to the manager of appellant that he would set aside from the loan \$410.00 for each building

073 1212

Applicant was given for money and received an
amount of an alleged mortgage on which furnished by it
for the construction of these three buildings. The amount
furnished was claimed to be the sum of \$100,000 and interest
thereon.

The witness took and that in the year 1918,
plaintiff, applied, owned three lots which he desired to
develop. To that end he obtained a loan from the
Western Bank and Mortgage Company, the proceeds of which
was lent with the company for development by it on the
within premises. He also made a general contract with
one person to erect three buildings. On August 21, 1918,
plaintiff filed with the loan company an affidavit which pur-
ported to set forth the names of all firms or persons with
whom it had made contracts for labor or material. Therein
he listed the name of applicant company as having a sub-
contract to furnish common brick to the amount of \$1250.00.
A few days thereafter the plaintiff and the contractor went
to the office of the defendant company and made arrangements
to have the brick furnished at the price of \$7.00 per
thousand. The prices were stated by the contractor in his
own name and he at that time stated to the manager of applicant
that he would not make from the loan \$100,000 for each building

to the credit of the brick company; that he didn't think it would run that much, but would set aside sufficient so that nothing would be short, and further stated that the orders for the money would be signed by the plaintiff as the bricks were delivered. Thereafter on September 12th, 18th and October 6th respectively, plaintiff gave three written orders to the loan company to pay the defendant the aggregate sum of \$1230.00 on account of brick furnished, and charge the same to the proceeds of the loan in its hands. The defendant cashed these orders and receipted for the payment in writing on the back of the orders, agreeing to waive all its liens.

Appellant, contending this evidence was insufficient to prove the overcharge, asked the court to find as a fact that the \$190.00 sued for was received by defendant for a good and valuable consideration. It further requested the court to hold as a fact that the money received by the defendant was the money of Iversen, the general contractor, and not the money of the plaintiff. The evidence tends to show that an excess payment was made to the amount for which judgment was entered. The proof, we think, was prima facie sufficient to establish this fact. It was not contradicted. The evidence by which it might have been contradicted, if untrue, was in the possession of the defendant. We cannot say the findings of the court as to facts are against the weight of the evidence.

Appellant also submitted propositions of law by which the court was requested to hold that the facts showed an equitable assignment by the general contractor with the knowledge and approval of the owner of the money which should become due the general contractor under his contract. The court refused to so hold. We think the court did not err. It is said in Pomeroy's Equity Jurisprudence, 4th Edition, Vol. 3, pages 3084-5, "What shall amount to the present

In the event of the bank company, when he died, it
would run that bank, but would not receive anything or that
anything would be made, but further stated that the order for
the money would be signed by the plaintiff as the bank was
authorized. Thereafter on September 18th, 18th and October 20th
respectively, plaintiff gave three written orders to the bank
amounting to pay the defendant the sum of \$100.00 on
account of bank furnished, and charge the same to the proceeds
of the loan in its hands. The defendant cashed these orders
and retained for the payment in writing on the book of the
bank, agreeing to give all the same.

Appellant, regarding this evidence as insufficient
to prove the overdraft, asked the court to find as a fact
that the \$100.00 was not received by defendant for a good
and valuable consideration. The further requested the court to
find as a fact that the money received by the defendant was the
money of the bank, the money of the bank, and not the money of
the plaintiff. The evidence tends to show that an excess pay-
ment was made to the amount for which judgment was entered. The
proof, we think, was given by the plaintiff to establish this
fact. It was not contradicted. The evidence by which it
might have been contradicted, it appears, was in the possession
of the defendant. We cannot say the findings of the court as
to these are against the weight of the evidence.

Appellant also submitted propositions of law by which
the court was requested to hold that the facts showed an
assignment by the general contractor with the
knowledge and approval of the owner of the money which should
become due the general contractor under his contract. The
court refused to so hold. We think the court did not err.
It is said in *Barney's Equity Jurisprudence*, 2d Edition,
Vol. 3, page 302-3, "That shall amount to the present

appropriation which constitutes an equitable assignment, is a question of intention to be gathered from all the language construed in the light of the surrounding circumstances." We do not find in the facts in this record anything which indicates the intention of the plaintiff, who was the owner of the funds in the hands of the loan company, to part with his title to these funds, or surrender the control thereof to the contractor. On the contrary as against the contractor he retained the absolute control of them. There was not therefore an equitable assignment.

Hewell v. Grant Locomotive Works, 50 Ill. App. 611; Eyman v. Snyder, 112 Ill. 99; Mathison v. Magnuson, 226 Ill. 368.

Nor was it necessary as appellant supposes that privity of contract should exist between plaintiff and defendant to enable plaintiff to maintain an action for money had and received. Highway Commissioners v. Bloomington, 253 Ill. 173.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

THE UNITED STATES OF AMERICA

IN SENATE
January 11, 1901.
REPORT
OF THE
COMMISSIONER OF THE
GENERAL LAND OFFICE
IN RESPONSE TO A
RESOLUTION PASSED
BY THE SENATE
MAY 10, 1899.
WASHINGTON:
GOVERNMENT PRINTING OFFICE:
1901.

IN RE PETITION OF
C. C. MITCHELL, receiver,
Appellee,

vs.

SAMUEL MIDLINSKY,
Appellant.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Samuel Midlinsky from an order of the Superior Court of Cook County by which one Clement C. Mitchell, receiver, recovered from him the sum of \$336.00, for rent from November 1st, ¹⁹¹⁶ to October 31st, 1917, of certain premises of which Mitchell was receiver. The premises had been conveyed to a trustee for the purpose of securing an indebtedness represented by promissory notes. The conveyance included the rents, issues and profits. The deed of conveyance was recorded prior to appellant's entry upon the premises. A bill to foreclose the trust deed was filed on May 12, 1916. On July 10, 1916, by amendment, appellant was made a defendant to the bill as tenant in possession. On September 12, 1916, he was defaulted upon personal service. On October 24, 1916, appellee was appointed receiver of the premises. In the order by which he was appointed, the court directed "that the tenants pay to the said receiver the usual and customary rents for the apartments occupied by them, and that said receiver have authority to rent any apartment now or hereafter becoming vacant at the usual and customary rental therefor." On January 16, 1917, a deficiency decree was entered. The petition of the receiver was filed November 30, 1917.

Appellant by way of defense set up as a fact that

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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he had paid his rent to one Sol Rubin, who was the owner of the premises prior to the filing of the bill; that he had an agreement with said Rubin whereby his rent up to and including the 10th day of November, 1917, should be paid by giving credit on certain debts and mutual accounts between him and Rubin. Some testimony was offered and received to this effect. Whether the court found the fact proved from the evidence does not appear from the record. It is perhaps immaterial as we cannot assent to appellant's contentions that there was no relationship of landlord and tenant existing between him and the receiver; that he never attorned to the receiver and that the receiver, therefore, could not maintain an action against him for the use and occupation of the premises.

There might be merit to these contentions of appellant if he had not been made a party to the proceeding to foreclose. He was, however, made a party to that proceeding. Personal service was had upon him. The bill of complaint set up the facts as to the conveyance by the trust deed of the premises and the rents, issues and profits thereof, and prayed for the appointment of a receiver of them. In that proceeding to which appellant was a party he, by an order entered as this court must presume upon due notice, was directed to pay the rent to the receiver. He did not appeal from this order. He did not object to it as far as the record shows. It is true as appellant contends that there was no privity between appellant and the receiver prior to that time, but the court had power to compel him as a tenant in possession to attorn to the receiver. Woodruff v. Connell, 38 Ill. App. 475, and Stephen v. Reibling, 45 Ill. App. 52. We think the order to pay the rent to the receiver amounted to a direction to

appellant to attorn to him and that by remaining in possession of the premises thereafter, appellant recognized the title of the receiver and by implication agreed to hold under such title. The relation of landlord and tenant was, therefore, established and he became liable to pay the reasonable rental value of the premises. It is not claimed that the amount recovered is unreasonable.

The decree of the Superior Court will be affirmed.

AFFIRMED.

211 - 24135

MRS. C. W. CARUTHERS and
ANNA JONES,
Appellants,

vs.

PIONEER AUTO SALES COMPANY,
a corporation,
Appellee.

213 I.A. 670

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellants were plaintiffs below and sued appellee claiming that they had made a contract with it for the purchase of an automobile for the sum of \$500.00; that it was agreed that upon the payment of \$100.00, the automobile should be delivered to the plaintiffs or to whomsoever they directed, the balance to be paid in monthly installments; that plaintiffs made a total payment of \$115.00 thereon and demanded the delivery of the automobile which was refused; that they thereupon demanded the return of the money paid under their contract which was also refused. The suit was to recover the \$115.00 paid. The affidavit of merits stated "the defendant is not guilty of any of the matters and things alleged in said statement of claim and that the defendant is not indebted to plaintiff in any sum whatever."

Plaintiffs testified to facts tending to show the purchase of the automobile under the terms of an oral contract made with one Hinman, an agent of defendant by which the automobile was to be delivered upon the payment of \$100.00. By way of defense the defendant produced and offered in evidence a written contract made June 27, 1917, for the purchase of the automobile in question signed by appellant, Caruthers, alone. The written contract stated that one-half

EXHIBIT 1070

... were plaintiffs' belief and good faith ...
... they had made a contract with ... the ...
... as an automobile for the sum of \$200.00 ... that it was ...
... upon the payment of \$200.00, the automobile should ...
... to the plaintiff or to whomsoever they directed ...
... to be paid in monthly installments; that plaintiff ...
... a total payment of \$200.00 thereof had demanded the ...
... at the automobile which was returned; that they ...
... demanded the return of the money paid under their ...
... which was also returned. The only way to recover the ...
... \$200.00 paid. The affidavit of plaintiff stated "the ...
... at any of the ... and ... allowed in ...
... of claim and that the ... is not ...
... in my own interest."

... plaintiff's demand to ... to show the ...
... of the automobile under the terms of an oral contract ...
... with one ... on ... of ...
... was to be delivered upon the payment of \$200.00 ...
... of defense the defendant produced and offered in ...
... a written contract made June 27, 1934, to the ...
... of the automobile in question signed by ...
... alone. The written contract recited that one-half

of the total purchase price was to be paid before the car would be delivered. Plaintiffs objected to the introduction of the written contract in evidence claiming that it was not admissible under the rules of the Municipal Court. The admission of this contract is the principal error that is urged here. If the contract was admissible, it is clear plaintiffs could not recover because the oral conversations to which they testified could not be permitted to vary the terms of the written contract.

The rules of the Municipal Court are made a part of the record. As the action was for the recovery of money only, we think rule 18 is the one which must be applied. The gist of that rule is that the affidavit of merits shall specify the nature of the defense "in such manner as to reasonably inform the plaintiff of the defense which will be interposed at the trial." The affidavit of merits in this case is far from a model. It attempts to interpose a plea appropriate to an action in tort to a statement of claim which is in the nature of an action on a contract. The record, however, does not show a motion to strike it and in spite of its defects we think it did not leave plaintiffs in ignorance of the defense to be interposed. The defense set up raised an issue of fact arising out of the statement of claim. The written contract produced covered the subject matter of the alleged verbal one. It was a part of the same transaction. It was admissible to impeach the testimony of plaintiffs as to the terms of that contract. We think plaintiffs could not be in ignorance that this defense might be interposed at the trial, that the court did not err in admitting the written contract in evidence, and that it conclusively appeared therefrom that the plaintiffs could not recover.

The judgment will therefore be affirmed.

AFFIRMED.

at the federal purchase price was to be paid before the car would be delivered. Plaintiff objected to the introduction of this evidence in evidence claiming that it was not admissible under the rules of the Municipal Court. The admission of this evidence as the principal error that is urged here. If the contract was admissible, it is clear plaintiff could not recover because the oral conversations to which they would be subject would be excluded to keep the terms of the written contract. The rules of the Municipal Court are made a part of the record. As the action was for the recovery of money only, no other rule is in the case which must be applied. The first of the rules is that the affidavit of service shall specify the nature of the defense in such manner as to reasonably inform the plaintiff of the defense which will be introduced at the trial. The affidavit of service in this case is far from correct. It attempts to introduce a plea appropriated to an action in tort as a statement of claim which is in the nature of an answer on a contract. The record, however, does not show a motion to strike it and in spite of its defects we think it did not leave plaintiff in ignorance of the defense to be introduced. The defense set up raised an issue of fact arising out of the statement of claim. The written contract recited covered the subject matter of the alleged verbal one. It was a part of the same transaction. It was admissible as evidence of the testimony of plaintiff as to the terms of that contract. We think plaintiff could not be in ignorance that this defense might be introduced at the trial, that the court did not err in admitting the written document in evidence, and that it conclusively appeared therefrom that the plaintiff could not recover.

The judgment will therefore be affirmed.

APPROVED.

Respectfully,
J. H. [Signature]

217 - 24141

LEPMAN & HEGGIE, a corp.,
Appellee,

vs.

MOUNTAIN GROVE CREAMERY CO.,
a corp.,
Appellant.

213 I.A. 671

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellee, plaintiff, sued the defendant, appellant, claiming damages for the defendant's failure to deliver butter under the following contract:

"Mountain Grove, Missouri,
March 14th, 1917.

Lepman & Heggie, Chicago, Illinois,

Gentlemen:

We hereby confirm our sale to you and your purchase from us, of three cars of our No. 1 butter, to score 87 points or better, the scoring to be done by Mr. A. H. Rohol, delivery to be made at seller's option in June, 1917, at 28½ cents f. o. b. Chicago. This agreement made in duplicate and signed by both parties constitutes a contract.

(Signed) Mountain Grove Creamery Company,
H. W. Jensen.
Lepman & Heggie.
A. H. Rohol."

The defendant wrote with reference to the contract saying, "If you would consider a reasonable brokerage and cancel the sale we would be glad to hear from you." To which plaintiff replied in effect, that as it had been stated at the time of the sale the butter was then sold at an advance of ¼ cent and the purchaser was demanding delivery, plaintiff would expect defendant to deliver as per agreement. On May 19, 1917, defendant wrote plaintiff that it would be impossible to deliver the butter at the price named in the contract on account of war conditions. On June 28, 1917, the plaintiff

81214 851

27 - 1917

RECEIVED - MAY 10, 1917

27

RECEIVED - MAY 10, 1917

TO THE HONORABLE SECRETARY OF THE INTERIOR
WASHINGTON, D. C.
SIR:
I have the honor to acknowledge the receipt of your letter of the 27th inst. in relation to the matter of the proposed purchase of the land in the State of Illinois, and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

Very respectfully,
A. H. HARRIS,
Special Agent in Charge.

Enclosed for the Secretary of the Interior are two copies of a letterhead memorandum from the Bureau of Land Management, dated and captioned as above.

The enclosed matter is for your information.

"If you would consider a reasonable purchase and cannot do so, we would be glad to hear from you." To which plaintiff replied in effect, that as it had been stated at the time of the sale the buyer was then sold at an advance of 1 cent per acre, and the purchase was a reasonable delivery, plaintiff was not entitled to recover. On May 10, 1917, the defendant wrote plaintiff that it would be impossible to deliver the buyer as the price named in the contract on account of war conditions. On June 28, 1917, the plaintiff

telegraphed defendant demanding delivery.

The plaintiff upon the trial offered, and the court over objection of the defendant received, testimony tending to show that in the butter trade in the city of Chicago in June, 1917, in the absence of a provision fixing the amount in the contract, a carload of butter was universally considered and taken for granted to contain 300 tubs of at least 60 pounds to the tub, that the words "delivered by him at seller's option in June, 1917" at that time and place had a special significance which was that the seller had the privilege of delivering from the 1st of June up to the last day of the month, that the market price of the butter called for by the contract in Chicago on June 30th, 1917, was 35½ cents per pound.

Appellant contends that it was error for the court to receive evidence as to the customs of the trade in Chicago, the meaning of the trade terms there etc., because the contract was made in Missouri. It insists, therefore, that Missouri laws and customs would be controlling. As to the validity of the contract the laws of Missouri would control because the contract was made there, but since the contract by its terms provided that it was to be performed in Chicago, the customs of the market of Chicago and the laws of Illinois were in contemplation of the parties and must determine the rights of the parties in a suit for non-performance of the contract. Defendant was accustomed to deal in the Chicago market. Price v. Burns, 101 Ill. App. 418; Abt v. Am. T. & Sav. Bk., 159 Ill. 467; Samuels v. Oliver, 130 Ill. 79; Bailey v. Bensley, 87 Ill. 559.

As to the objection that evidence should not have been received for the purpose of proving the meaning of the phrase in the contract, "delivery to be made at seller's

defendant's demand for delivery.

The plaintiff upon the trial offered, and the court

over objection of the defendant received, testimony tending to

show that in the butter trade in the city of Chicago in June,

1917, on the average of a provision fixing the amount in the

market, a carload of butter was universally considered and

taken to be granted to contain 300 tubs of at least 60 pounds to

the tub, and the words "delivered by him at seller's option in

June, 1917" at that time and place had a special significance

in that it was that the seller had the privilege of delivering from

the lot of June up to the last day of the month, that the market

price of the butter called for by the contract in Chicago on

June 30, 1917, was 34 1/2 cents per pound.

Appellant contends that it was error for the court

to receive evidence as to the custom of the trade in Chicago,

the meaning of the trade terms there etc., because the contract

was made in Illinois. It insists, therefore, that Missouri

law and custom would be controlling. As to the validity of

the contract the laws of Missouri would control because the

contract was made there, but since the contract by its terms

provided that it was to be performed in Chicago, the customs

of the market of Chicago and the laws of Illinois were in

controlling of the parties and must determine the rights of

the parties in a suit for non-performance of the contract.

Defendant was accustomed to deal in the Chicago market. Price

7. Hunt, 101 Ill. App. 418; Aut v. Am. T. & Sav. Bk., 102 Ill.

444; Willis v. Oliver, 130 Ill. 73; Bailey v. Bessley, 34 Ill.

532.

As to the objection that evidence should not have

been received for the purpose of proving the meaning of the

phrase in the contract, "delivered by him at seller's

option in June, 1917," we think the plain meaning of that phrase, irrespective of any evidence offered to establish the fact, is that the seller would have any day in June up to the 30th to make delivery. The defendant was, therefore, not injured by the admission of that evidence.

Appellant next contends that the agreement sued on is merely an option contract in which appellant agreed at its option to sell these three cars of butter during the month of June, 1917. We do not think so. This construction cannot be extracted from the plain meaning of the words. It is wholly inconsistent with the written request of appellant to be released from its obligation to deliver and its offer to pay the brokerage fees, etc., if plaintiff would release it. The promise to buy was a consideration for the promise to sell. The contract was mutual. It was so interpreted by both parties. If the meaning of the agreement were doubtful or ambiguous, the construction of the parties would prevail. As was said in Black v. Knox, 213 Ill. 195, "no extrinsic aid can be more valuable."

Appellant also complains because the court in instructing the jury told it in effect that if the defendant was liable the measure of plaintiff's damages was the difference between the contract price and the market price at the time and place where the butter should have been delivered. Appellant concedes this to be the general rule, but argues that it does not apply where, as here, at the time the sale was made, the vendor was informed that a subcontract for resale had been made at an advanced price. It argues that in such case the vendee's damages are limited to the difference between the contract price in the original contract and the contract price on such resale. This has been the rule applied in many cases, some

of which are cited by appellant. Carpenter et al. v. First National Bank of Joilet, 119 Ill. 360; Hagen et al. v. Hawle, 143 Ill. App. 543.

These cases do not hold, however, that the vendee is limited upon breach of his contract to a claim for such damages. On the contrary he has his election to abandon his subcontract and so claim, or he may elect to fulfill his subcontract, purchase the goods necessary to do so on the market and recover from the vendor the difference between the market price and the price at which the vendor agreed to deliver. Benjamin on Sales, 7th ed. 933.

Such was the rule in this state prior to the adoption of the Uniform Sales Act, July 1, 1915. Section 67 of that Act, Hurd's Revised Statutes, Chap. 121a, page 2329, provides that in an action by a buyer against a seller for failing to deliver goods where title has not passed "Where there is an available market for the goods in question the measure of damages in the absence of special circumstances showing proximate damages of a greater amount is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered. * * * ." The instruction conformed to the statute.

Appellant also complains that there is no proof that plaintiff was ready and able to receive and pay for the butter on June 30th. That proof is not necessary where as in this case the vendor has declared that he will not deliver. North W. I. & M. Co. v. Hirsch, 94 Ill. App. 581.

The judgment will be affirmed.

AFFIRMED.

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229 - 24154

FRANK O. DEMONBY, Appellee,

vs.

J. L. TUMA, Appellant.

213 I.A. 671

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, appellee, sued the defendant for \$245.00 for services alleged to have been rendered as an architect in preparing plans, estimates etc. for the construction of a two-flat building. The statement of claim alleged that the "said services were rendered as desired by the defendant." The defendant in his affidavit of merits alleged by way of defense that the plaintiff had agreed with him to make plans and specifications for a building to be built at a cost not to exceed \$6500.00; that the plaintiff refused and neglected to submit such plans or specifications.

The parties upon trial of the case by a jury offered evidence tending to sustain their respective contentions and at the conclusion of the evidence the court instructed the jury to find against the defendant and assess the plaintiff's damages at \$245.00. There was evidence tending to sustain defendant's theory of the case and from which we think a jury might have reasonably found for him. The instruction was, therefore, erroneous. Devine v. Delane, 272 Ill. 179.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

239 - 24164

PAUL McRUGH, a minor, by MICHAEL
McRUGH, his next friend,
Appellant,

vs.

CITY OF CHICAGO.

Appellee.

213 I.A. 671

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant, a minor, by his next friend sued appellee, City of Chicago, in an action on the case for alleged negligence whereby plaintiff while in the exercise of due care was injured on the 12th day of November, A. D. 1913. The declaration alleged notice of the injury to the City as follows:

"And the plaintiff avers that on to-wit, the 11th day of May, A. D. 1914, he caused to be served upon the City Attorney, the Corporation Counsel and the City Clerk of the City of Chicago, a certain notice in compliance with the statute in such cases made and provided notifying the City of the place of residence of the plaintiff, the date and time of the injuries, the cause and place of the injuries and the name and address of the physician who attended the plaintiff."

Upon trial plaintiff offered in evidence a written notice which counsel for defendant admitted was duly served upon the proper officers. The defendant, however, objected to the introduction in evidence of the notice on the ground that it was not set up in the declaration, and also because it was insufficient. The court overruled the objection that the notice was insufficient, but sustained the objection that it was not set out in the declaration and instructed the jury to find the defendant "not guilty."

The contention of appellant is that the trial court erred in excluding the written notice. He ^{also} argued in the trial court and urges here that because he was a minor it was not necessary for him to give the statutory notice in order to main-

tain his action. No authorities in point from the Supreme or Appellate courts of this State are cited. The Appellate court of the Second District has recently decided adversely to this contention. McDonald v. City of Spring Valley, 209 Ill. App. 7, and 285 Ill. 52.

The statute requiring notice in such cases, chap. 70, par. 7, Hurd's Rev. Stat. 3 Jones & Add. Ann. Stat., par. 6190, p. 3412, has been often construed. It is settled that notice as required by the statute must be averred in the declaration in order to state a cause of action. Erford v. City of Peoria, 229 Ill. 546; Walters v. City of Ottawa, 240 Ill. 259; Guimette v. City of Chicago, 242 Ill. 501. It is not necessary, however, that the notice be set out in haec verba. It is sufficient if the substance thereof is stated.

Appellant asserts that the averment of notice in plaintiff's declaration is insufficient in these respects: (1st) It does not allege that the notice was filed in the office of the City Attorney and City Clerk. (2nd) That it does not aver the name of the person injured or the name of the person to whom the cause of action accrued. (3rd) It does not aver that it was signed by the plaintiff, his agent or attorney. As to the first objection, it was held in Richmond v. City of Marseilles, 190 Ill. App. 227, on the authority of Ronaldson v. Village of Dieterich, 247 Ill. 522, that handing the notice to the City Clerk outside of his office will, under some circumstances, constitute a sufficient service of it. As to the second objection, the name of the person injured and to whom the cause of action accrued is alleged in the declaration, although in that part of it averring notice he is described as "the plaintiff." We think this objection is hypercritical. As

to the third objection, while the declaration does not specifically aver that the notice was signed by the plaintiff or his agent or attorney, it does set forth facts from which it might reasonably be inferred that plaintiff's name appeared therein and that it must have informed the City that plaintiff was the party giving the notice, and that he claimed an action had accrued to him.

Appellee relies on two cases. The first of these, Beveridge v. Illinois Fuel Co., 283 Ill. 31, is not in point because the question there decided did not have reference to the sufficiency of the averments of the declaration. On the contrary the question there was whether the averments of the declaration had been proved by sufficient evidence. The second case cited, People v. Banks, 272 Ill. 502, is not in point either because it was decided upon a demurrer interposed to the declaration and it is elementary that on demurrer the declaration is construed most strongly against the pleader. In this case the defendant pleaded to the declaration, taking issue upon the merits. Formal defects in the declaration, if any, were thereby cured. L. E. & M. S. Ry. Co. v. Sessions, 150 Ill. 557; 1 Chitty on Pleadings, 16th Amer. Ed. 843. We do not hold that this declaration would have been good as against a special demurrer. We do hold it was sufficient after the defendant took issue thereon. As was said in Donaldson v. Village of Dieterich, supra. "The object of the statute is to furnish timely notice to the city, village or town of the fact that the party claims to have sustained an injury and that he proposes to enforce his claim for damages against the said city, village or town by suit and thereby enable said city, village or town to investigate the claim while the facts are fresh and the jus-

It was also suggested, while the investigation was not complete, that after the notice was signed by the plaintiff or his agent, it might be shown that he does not have power from whom it might possibly be inferred that plaintiff's name appeared thereon. It may have informed the City that plaintiff was the one giving the notice, and that no claim on action had been made.

It is also noted that the defendant was not present at the hearing on the motion for summary judgment. The court has considered the evidence and the law and has concluded that summary judgment should be granted in favor of the plaintiff. The court has also considered the evidence and the law and has concluded that summary judgment should be granted in favor of the plaintiff.

tice of the claim can be readily ascertained." We think the declaration, reasonably construed, averred a notice which accomplished the purpose of the statute. It was therefore error for the court to exclude the evidence offered. McComb v. City of Chicago, 263 Ill. 510.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

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REMIEN & KUHNERT COMPANY,
a corporation,
Appellee,

2131.A. 671

APPEAL FROM

vs.

MUNICIPAL COURT

A. BOLTER'S SONS, a corp.,
Appellant.

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, appellee, entered into a contract with defendant, appellant, whereby defendant agreed to provide and install the structural steel and cast iron work required upon a certain building. By the terms of the contract defendant agreed to hold plaintiff and others named in the contract harmless "from all liability, loss, claims, demands, costs and expenses, including solicitor's fees, arising from any and every accident happening to or injury sustained by any and every employe or person whomsoever * * *."

While the work progressed one of the employes of a subcontractor was struck and killed by a derrick which fell on him. His administrator brought suit in the Superior Court against appellee claiming damages under the statute. Appellee notified appellant to defend the suit in the Superior Court and the appellant thereupon employed attorneys who entered the appearance of appellee therein and filed a plea of not guilty. Later the appellee through other attorneys acting for it requested the attorneys to file a special plea denying that appellee at the time of the accident owned or controlled the derrick in question. The attorneys refused to do this. Thereupon appellee's own attorneys entered its appearance and filed the plea. The cause came on for trial and after argument upon the issue raised by this special

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Plaintiff, appellee, entered into a contract with
appellee, appellant, whereby defendant agreed to provide
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for a certain building. By the terms of the contract
appellee agreed to hold plaintiff and others named in the
contract harmless from all liability, loss, claims, demands,
costs and expenses, including collection's fees, arising from
any and every accident happening to or injury sustained by
any and every employee of person whatsoever.

While the work progressed one of the employees of
appellee was struck and killed by a hammer which
fell on him. His death occurred while he was in the process
of erecting appellee's building under the contract.
Appellee notified plaintiff to defend the suit in the location
of the accident and the appellee through counsel afterwards was
advised the appearance of appellee therein and filed a plea
of not guilty. Later the appellee through other attorneys
retained for is requested the attorney to file a special plea
denying that appellee at the time of the accident named or
controlled the building in question. The attorney refused to
do this. Thereupon appellee's own attorney entered the
appearance and filed the plea. The case came on for trial
and the judgment upon the issue raised by the appellee

plea, the court directed a verdict in favor of appellee.

Appellee then demanded that appellant pay the attorneys' fees and expenses incurred by it in the suit. Appellant refused.

Appellee sued on the contract and had judgment.

Appellant first contends that it is not liable under the contract; that a proper construction of the contract sued on is that appellant agreed to indemnify for attorneys' fees, etc., only as to claims for injuries arising under the provisions of the Compensation Act. Appellant did not contend for this construction of the contract in the trial court. On the contrary at the opening of the trial its attorney stated, "We had this contract whereby A. Bolter's Sons agreed to build the building and furnish the material, erect it, etc., and also to hold the owner, Remien & Kuhnert Company, harmless from all damages and liabilities resulting from any accidents; and including solicitors' fees. There is no question about that." It is true as appellant contends that if there is no ambiguity in the contract, appellant is not bound by this statement. Rosenbaum Bros. v. Devine, 271 Ill. 354. After a careful reading of the contract we think the statement of counsel correctly sets forth the intention of the parties as expressed in it. However, if the language of the contract is regarded as doubtful and ambiguous, then the construction put upon it by the parties to it is of the highest value. Slack v. Knox, 213 Ill. 195, and we think if so regarded, the statement of counsel is conclusive as to the construction we ought to adopt.

It is next urged that appellee had no right to intervene in the suit in the Superior Court, or to take the exclusive control of the litigation from appellant. Appellant says appellee authorized it to employ attorneys and appear for appellee in the suit in the Superior Court, that appellant was the party ultimately liable, that it was under the contract

that, the court directed a verdict in favor of appellee. Appellee then requested that appellant pay the attorney's fees and expenses incurred by it in the suit. Appellant refused. Appellee sued on the contract and had judgment.

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construction of the contract in the trial court. On the contrary it is the contention of the trial court that the contract was made for the purpose of the trial the attorney needed. "We had this contract made," it is stated, "and we agreed to build the building and furnish the material, erect it, etc., and also to hold the property, furnish a competent company, persons from all demands and liabilities resulting from any accidents, and including solutions."

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to which the statement of counsel correctly sets forth the intention of the parties as expressed in it. However, if the language of the contract is regarded as doubtful and ambiguous, then the construction put upon it by the parties to it is of the highest value. Boehm v. Bess, 271 Ill. 384, and we think it

is correct, the statement of counsel is conclusive as to the construction we ought to adopt.

It is now urged that appellee had no right to intervene in the suit in the Superior Court, or to take the initiative control of the litigation from appellant. Appellant says appellee authorized it to employ attorneys and appear for appellee in the suit in the Superior Court, that appellee was the party ultimately liable, that it was under the contract

strictly an indemnitor, that as such it was bound to defend the appellee and hence had the right to manage and direct the defense of the suit. It admits it did not have the right to mismanage it. It concedes that if it did so, appellee had the right to take the litigation out of its hands. It says, however, that the facts as to the action in the Superior Court and the pleadings there are not set up with sufficient fullness in this record to warrant the court in finding the case was mismanaged.

We do not think it necessary for us to decide whether the case was or was not mismanaged. The contract gave to appellant no right to control the litigation. Assuming the relation established by the contract between the parties was that of indemnitor and indemnitee, we think the indemnitee had the right in the absence of a provision in the contract giving appellant that power to control the defense of the suit brought against it. The purpose of giving notice and the opportunity to defend the suit to the indemnitor is not to give ground for an action, but to bind him by the judgment entered. Drennan v. Bunn, 124 Ill. 189. In the absence of an express agreement to that effect, we do not think the indemnitee is bound to give the indemnitor exclusive control of the litigation. It would seem that both indemnitor and indemnitee in such cases should be permitted to defend the same as if they were jointly sued. Oceanic Steam Nav. Co., Ltd. v. Compania Trans-Atlantica Espanola, 39 N.E. 360; Town of Waterbury v. Waterbury Traction Company, 50 Atl. 3. We think appellant was liable under its contract for the claim upon which it was sued. It is conceded that if liable the amount of the judgment is reasonable. It will be affirmed.

AFFIRMED.

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...of the suit. It admits it did not have the right to
...it. It concedes that it did so, appellee had the
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...25, 114. v. Commercial Union Assurance Co. N.H.
...100; Town of Waterbury v. Waterbury Trading Company, 80 Vt. 3.
...to think appellee was liable under its contract for the claim

...which it was sued. It is conceded that it liable the
...of the judgment is reasonable. It will be affirmed.

273 - 24200

JOSEPHINE LAGAN,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

213 I.A. 672

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered on the verdict of a jury in favor of plaintiff for the sum of \$2500.00. By stipulation of the parties appellant has waived all errors assigned, except that the damages are excessive. Appellee has confessed that error and filed a remittitur in the sum of \$700.00. Appellant now moves that the judgment be affirmed for the sum of \$1800.00.

The judgment will be affirmed on such remittitur.

AFFIRMED.

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LUCY C. CATHERWOOD and
ROBERT CATHERWOOD,
Appellees,

vs.

CARR and MOORE, a corporation
et al.,

On Appeal of CARR and MOORE,
a corporation,
Appellant.

213 I.A. 672

INTERLOCUTORY.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an interlocutory order entered October 5, 1918, which restrained it from enforcing a decree of sale entered in its favor by the Superior Court August 23, 1918. Said order also denied the motions of appellant to dismiss the bill of complaint and to dissolve a prior and similar ten day injunction order. The bill of complaint upon which the injunction order was issued was filed September 24, 1916. It alleged in substance that one of the complainants, Lucy C. Gatherwood, was the owner of certain real estate described in the bill and by the decree of sale under which it was about to be sold; that it was of the value of \$50,000; that she leased the said premises to one Louis Weiss, who by the terms of the lease was authorized and permitted to make certain improvements thereon for which he agreed to pay; that said tenant entered into contracts with appellant, Carr and Moore, to make said improvements; that the work was completed on December 21, 1916, and that on April 12, 1917, a mechanic's lien claim was filed by appellant in the Circuit Court Clerk's office; that on June 17, 1918, a bill to foreclose said lien was filed in the Superior Court

and summons was issued against complainants returnable to the June term thereof; that said process was never served upon them, or either of them; that nevertheless the sheriff of Cook County made a return of said process, that he served the same by leaving a copy thereof for each of complainants at their usual place of abode with Martha Bartsch, a member of their family, a person of the age of ten years and upwards, at the same time informing her of the contents thereof. That on August 10, 1918, complainants were defaulted, said cause referred to a Master in Chancery who took the proofs, made and filed his report with a transcript thereof and upon said report, the said decree of sale was entered. The bill sets up said decree in hanc verba. It further sets up that said Martha Bartsch was not a member of complainants' family; that at the time of the supposed service complainants were outside of the State of Illinois and in the State of Colorado; that Martha Bartsch never communicated to complainants, or either of them, the fact of the attempted service of process of said mechanic's lien suit, or any of the incidents connected therewith until on or about September 17, 1918; that the complainants never saw a copy of the process of summons, nor did they hear of the suit, or know of its existence until the 10th day of September, 1918.

The bill further alleges that appellant with the aid of the tenant fraudulently and collusively concealed from complainants all knowledge that any demand was to be made upon them with respect to their property; that the claims allowed in the mechanic's lien suit were grossly excessive; that the tenant although primarily liable to Carr and Moore was financially irresponsible and confederated with it; that he neither made nor offered any contest or defense in his own

[illegible]

behalf; that the reasonable cost of all the work done and materials furnished did not exceed the sum of \$4500.00, whereas the decree gives a lien for \$8430.83 with interest thereon; that by reason of fraud and collusion between appellant and said tenant, appellant is not entitled to maintain its claim for lien; that complainants have a complete defense to the bill for a mechanic's lien upon the merits.

Appellant claims it was error to grant an injunction because it was not asked for in the prayer for process. In this respect the bill is technically defective. We think, however, by its motions to dismiss the bill and to dissolve the prior similar injunction order, which motions were in writing and in which the defect was not pointed out, appellants waived it. Lasher v. Annunziata, 119 Ill. App. 653; Battledge v. B. C. District, 16 Ill. App. 655.

Appellant further invokes the general rule that a decree in chancery once enrolled cannot be opened, except by bill of review. It points out several respects in which considered as such a bill this one is defective. Hill et al. v. Phelps et al., 101 Fed. 650. The rule invoked does not apply here for the reason that the decree attacked was not entered in a cause heard upon the merits as to these complainants. Speaking of a similar case in Herbert v. Rowles, 30 Maryland 278, the court said:

"A bill of review would be of no avail, because his claim to relief is not based upon error apparent in the decree, nor on account of newly discovered evidence; and unable to charge fraud in obtaining the decree, he could not file an original bill to vacate it upon that ground. Accordingly it is laid down by the most eminent elementary writers, and fully sustained by adjudged cases, that where a case has not been heard upon the merits, the courts will, upon good cause being shown, 'exercise a discretionary power of vacating an enrollment and giving the party an opportunity of having his case discussed'."

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This court is committed to the same doctrine. Harper v. Mangel, 96 Ill. App. 526.

Appellant points out other alleged defects in the bill. It may be that it should have set up the alleged fraud with greater particularity and that its legal theory as to some of its supposed defenses to the mechanic's lien claim are untenable or defectively pleaded. We do not think it necessary to pass on these questions at this time. The bill shows that the decree was rendered without the knowledge of complainants; that they were never served with process; that they have acted with due diligence; that the decree is as to them unjust and inequitable; that irreparable injury will be sustained by them unless the injunction issue, and that no rights of third parties have intervened. There is, therefore, we think, equity in the bill. Upon such a showing it was fitting and proper to stay further proceedings and preserve the status until such time as the cause might be heard upon the merits. To that end the court had power to order the master to postpone the sale. The master was not a party to the cause and is not here complaining. He acts ministerially in executing a decree of sale. Appellant cannot assign error in his behalf. Borris v. Downing, 196 Ill. 91.

The judgment order will be affirmed.

AFFIRMED.

This court is composed of the judges of the court.

IN THE COURT OF THE COMMONS

appears before the court and other persons in the bill.

It is said that it is not the duty of the court to

exercise jurisdiction over the bill, but that it is the duty of the

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The judgment order will be affirmed.

ATTEST.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the court, this 1st day of January, 1881.

(325a)

HERMAN KAHN and HERMAN APPLEBAUM

vs.

RAFAEL GOLDSTEIN et al.

213 I.A. 672

CHARLES L. HARDWICK and J. MARY
NELSON, (Cross Complainants)
Plaintiffs in Error,

vs.

HERMAN KAHN, HERMAN APPLEBAUM and
RAFAEL GOLDSTEIN, (Cross Defendants)
Defendants in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE DYER
DELIVERED THE OPINION OF THE COURT.

January 27, 1912, Raphael L. Goldstein leased to Herman Kahn and Herman Applebaum the first floor of a building to be erected by the lessor at Nos. 1539-1541 Milwaukee Avenue, Chicago, to be occupied as a theatre from April 1, 1912, to March 31, 1922, at a monthly rental of \$500. The building was to be constructed in accordance with plans incorporated in a "rider" to the lease and was to be ready for occupancy on or before April 1, 1912, the certificate of the architect for the building to be conclusive between the parties as to completion of the building in accordance with the plans and at the time specified in the lease. To secure the performance of the terms of the lease the lessees deposited with the lessor \$6,000 to be forfeited as liquidated damages in the event that the lease was terminated by the default of the lessees, and it was provided that if forfeiture did not take place by April 1, 1916, the sum of money deposited was to be applied as rent for the premises from that date to March 31, 1917. The lease contained the usual covenants that lessees had examined and knew the condition of the premises; that they would keep them in repair and

that the lessor was not to be liable for damages occasioned by failure to keep the premises in repair; that if the premises were rendered untenable by fire or other casualty, the lessor might, at his option, terminate the lease or repair said premises within thirty days, and failing so to do, the lease should terminate. The covenants and agreements were to be binding upon, apply to, and inure to the administrators, assignees, etc.

The lessees took possession of and began operating a moving picture theatre in the building on July 25, 1912, and on October 2, 1912, they, with the written consent of the lessor, assigned the lease to Charles L. Hardwick and J. Mary Nelson, to be referred to hereinafter as the assignees. The assignees assumed the covenants of the original lessees. As a consideration for the transfer of the lease, including the \$6,000 deposited with the lessor, and certain personal property used in the theatre, the assignee paid lessees \$6,000 in cash and executed and delivered to them four promissory notes of \$2,000 each, payable with interest at 5% in six, twelve, eighteen and twenty-four months respectively. Pending the payment of the notes, the lease and a bill of sale for the personal property were deposited in escrow with the Chicago Title & Trust Company. The assignees took possession and operated the theatre from October 3rd to December 9th, 1912, when the roof of the building collapsed and the building thereby became untenable and remained in this condition for about fourteen months, when Raphael Goldstein executed a new lease to Kahn and Applebaum, the original lessees, who reconstructed and again operated the building for theatre purposes under a new name. Goldstein, the lessor, did not exercise his option to repair the premises within 30 days, which fact under the lease operated to terminate it. The assignees on January 22, 1913, began suit in the Municipal court of Chicago against the lessor, Goldstein, for the recovery of the \$6,000 which had been

deposited under the terms of the original lease.

On April 9, 1913, Kahn and Applebaum, the original lessees, filed their bill in equity in the superior court in which they prayed that Goldstein be decreed to pay them the \$6,000 deposited with him, and that "the same be applied on the Hardwick and Nelson notes held by them, and that the goods and chattels described in the bill of sale that were still in the possession of Hardwick and Nelson be sold and that the proceeds thereof be applied to the payment of the aforesaid notes."

Answers were filed by the assignees, Hardwick and Nelson, and they filed a cross-bill alleging the collapse of the building as being due to defective material and workmanship; to a violation of the city ordinances; to the failure to erect the premises in accordance with the plans and specifications attached to the original lease; to carelessness, negligence, etc., which facts were known to the original lessor and lessees and were unknown to the assignees and could not have been known to them by the use of ordinary diligence.

The assignees further charged that the consideration for the \$6,000 in question and the \$8,000 in promissory notes executed by them had wholly failed and they prayed an accounting of the amount due them; that the \$6,000 should be ordered delivered to them and the four promissory notes cancelled.

A decree was entered in the cause in favor of the complainants, and the defendants, being also cross-complainants, seek by this appeal to reverse this decree upon the sole grounds that the master's report and the decree based thereon are contrary to and not supported by the evidence.

It is insisted on behalf of the assignees that where there are obscure defects in a building which in their nature are dangerous to the life, health or property of a tenant, and which are known to a landlord to exist at the time of a leasing of the

premises and are unknown to the tenant and could not have been discovered by the tenant by reasonable examination, the landlord is obliged by the law to disclose such defects so that the tenant may guard against them, and that the landlord for his failure to notify the tenant of such defects will be legally liable for such damages as may result to the tenant therefrom. We agree with counsel for the assignees that this is a fundamental principle of law which applies in the ordinary case of a letting of real estate. Sunassack v. Mcrey, 196 Ill. 569. There is force in the argument that such conduct on the part of the landlord in concealing such defects constitutes more than mere negligence; that under the facts of certain of the cases it amounted to actual fraud. Borggard v. Gale, 205 Ill. 511.

It may be conceded that the defects in the building in question existing at the time the assignees took possession thereof were hidden and dangerous. The mere fact of the giving in of the roof of a building used for theatre purposes is enough in and of itself to indicate the extremely dangerous character of the defect which caused the collapse of the roof.

The evidence shows that after the collapse of the roof of the building, Kahn and Applebaum notified Goldstein, the lessor, not to pay over the \$6,000 deposited with him except upon their order; they also notified him that the lease which was placed in escrow had not been delivered to the assignees; that the assignees had not paid the amount due on their notes and that in the event he, the lessor, should pay over the \$6,000 or any part thereof without their consent, they, Kahn and Applebaum, would hold him responsible therefor. None of the four notes had been paid at the time this notice was given.

Counsel for assignees insist that the evidence is clear that the assignees knew there was something wrong with the

It may be contended that the attack in the building was a surprise attack at the time the business took possession of the building. The mere fact of the giving in of the tool of a building need not constitute an attack on the building which caused the collapse of the roof. The evidence shows that after the act of the attack on the building, Kahn and Applebaum notified the police, the latter, not to pay over the \$5,000 deposited with him except upon their order; they also notified him that the money which was placed in the account had not been delivered to the defendant; that the defendant had not paid the amount due on their notes and that in the event he, the latter, should pay over the \$5,000 or any part thereof without their consent, they, Kahn and Applebaum, would hold him responsible therefor. None of the four notes had been paid at the time this notice was given.

building about November 30, 1912, nine days before the collapse of the roof, but that they did not know the defects were in the roof until a few days before the accident. The assignees took possession of the building on October 3, 1912, and it is argued that if they knew on November 30, 1912, that the building was defective, there can be no question of the knowledge of its defective condition both on the part of the lessor, Goldstein, and the original lessees, Kahn and Applebaum.

The controversy before us concerns the knowledge and conduct of the complainants Kahn and Applebaum, who alone of the parties appear in this court in defense of the decree of the trial court. That court overruled exceptions to the master's report, which found that the evidence introduced sustained the contentions of Kahn and Applebaum.

Evidence was introduced which tended to show that Goldstein, the lessor, conducted negotiations with the contractors, as a result of which the roof construction of the building had been changed from that indicated in the original plans. But whatever may be said as to Goldstein's knowledge of the condition of the roof before the accident, or his responsibility for its condition, we are unable to see how his knowledge or conduct may be attributed to Kahn and Applebaum. The assignees dealt directly with them and assumed, under their contract, whatever rights and responsibilities had been acquired by Kahn and Applebaum under the original lease.

It is evident from the briefs filed on behalf of the assignees that they seek their relief mainly against Kahn and Applebaum. Whatever the fact may be, the evidence does not disclose that Kahn and Applebaum are playing "a game" with Goldstein, with a purpose to defraud the assignees. It is sought to charge

Kahn and Applebaum with responsibility for an alleged fraud as the result of which the assignees agreed to the assignment of the lease, but the findings of the master that Kahn and Applebaum had no knowledge, at the time of the assignment of the lease to the assignees, of the defective condition of the building, find support in the evidence.

Testimony was introduced to the effect that Kahn had stated, after the collapse of the roof of the theatre, that he knew of its dangerous condition from the time that he and Applebaum took possession of the theatre. This testimony was directly contradicted by Kahn, who stated on the witness stand that he had never stated to the assignees that he knew from the beginning that the roof was dangerous, or that it was defective, and he denied expressly that he knew that there was any defect in the roof.

The only evidence in the record to which our attention has been directed which tends to show that Kahn and Applebaum were parties to the alleged fraud practiced upon the assignees is that of certain admissions said to have been made by Kahn at the time of the transfer of the lease to the assignees and statements said to have been made by him after the collapse of the roof of the theatre.

The master had an opportunity to see and hear the witnesses and we are not willing to say that his findings upon all the evidence introduced before him are erroneous. Evidence of admissions is not of the most reliable kind.

"Because testimony to oral statements of a person, although it be honestly given, is peculiarly subject to the fallibility of human memory and because it is easily fabricated and for the further reason that what was said may have been imperfectly comprehended, wrongfully interpreted or misunderstood, courts declare that it should always be received with caution and that it is weak and even 'dangerous' evidence."

...with responsibility for an alleged fraud on the
...which the assignee agreed in the management of the house.
...of the master that they had not been in the house
...at the time of the management of the house to the assignee.
...of the defective condition of the building, this report in the
...statement.

Testimony was introduced to the effect that Kahn had
...after the collapse of the roof of the theatre, that he
...from of his dangerous condition from the time that he had applied
...from possession of the theatre. This testimony was directly
...contradicted by Kahn, who stated on the witness stand that he had
...never stated to the assignee that he knew from the beginning that
...the roof was dangerous, or that it was defective, and he denied
...expressly that he knew that there was any defect in the roof.

The only evidence in the record to which any objection
...has been directed which tends to show that Kahn and Applicant
...were parties to the alleged fraud practiced upon the assignee is
...that of certain admissions said to have been made by Kahn at the
...time of the transfer of the house to the assignee and afterwards
...and it has been made by him after the collapse of the roof of
...the theatre.

The master had an opportunity to see and hear the
...admissions and we are not willing to say that his findings upon
...all the evidence introduced before him was erroneous. Whatever
...of prejudice is not of the least relief.

It is not necessary to oral testimony of a witness
...it is not necessary given, as he is usually subject to the
...of human memory and because it is usually forgotten
...and the further reason that what was said may have been in
...entirely unconnected with the subject of the litigation.
...and that it is well and even 'dangerous' evidence."

"With respect to all verbal admissions it may be observed that they ought to be received with great caution."

Greenleaf on Evidence, Sec. 200; Bragg v. Geddes, 93 Ill.

39-60.

The decree of the Superior court will be affirmed.

AFFIRMED.

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213 I.A. 672

CHRISTINA A. BENSON,
Defendant in Error.

vs.

MARY W. C. NELSON,
Plaintiff in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review a judgment entered against defendant, Christiana A. Benson, in the Circuit court of Cook County, and in favor of plaintiff for the sum of \$10,000.

Notwithstanding the fact that this court has frequently condemned failure on the part of appellants or plaintiffs in error to abstract the record in compliance with the rules of this court and that judgments have been affirmed solely for such failure, we find the abstract of record filed in the instant case to be in part a mere index of the record. Also important testimony shown by the transcript of record does not appear at all in the abstract. The insufficiencies of the abstract of record are of such nature as compels us to affirm the judgment of the trial court. In view, however, of the importance of the litigation to the parties, we have examined the transcript of the record and the abstract for the purpose of determining whether reversible error was committed in the trial of the cause.

It is insisted on behalf of the defendant that a new trial should be awarded to her for the reasons (1) that the trial court erred in excluding competent evidence offered by defendant; (2) that the court erred in instructing the jury; and

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(3) that the evidence introduced on the trial wholly fails to support the verdict and judgment.

The evidence shows that the plaintiff, Christina A. Benson, and her husband, Nils C. Benson, were married in 1888; that they resided together at Thornton, Illinois; that seven children were born of the union, four of whom were living at the time suit was begun; that the parties lived together until the year 1911; that the husband made three trips to Sweden, one in the year 1909, one in the year 1910 and one in the year 1911; that on the last trip he stayed in Sweden for a period of more than five months, and that the defendant returned with him on the same ship to the United States; that he met her about a month later in Chicago; that the plaintiff learned of the existence of defendant sometime in the year 1909 or 1910, and that she employed detectives in the year 1911, who located the defendant living on North Clark street in Chicago.

The evidence further tends to show that Benson and defendant rented a room in a rooming house in Chicago in October, 1911, where he introduced her as his wife and where he visited her two or three times a week; that he would come in the afternoon and stay until the next morning; that the defendant occupied but one room, a bedroom, and that she spoke of Benson as her husband.

The plaintiff testified that her husband and defendant lived together in an apartment in the same town, Thornton, Illinois, where the plaintiff resided, for a period of five years and eight months. While it is insisted that Benson and plaintiff had severed their relations as husband and wife in the year 1909, there is sufficient evidence in support of the testimony of plaintiff that she and her husband lived together until sometime in the year 1911 and that prior to this date the defendant

(1) That the evidence introduced on the first trial is

against the verdict and judgment.

The evidence shows that the plaintiff, Christine A.

Johnson, and her husband, W. O. Johnson, were married in 1908;

that they resided together in the town of Johnson, Illinois; that seven

children were born of the union, four of whom were living at the

time said was begun; that the parties lived together until the

year 1911; that the husband made three trips to Sweden, one in

the year 1909, one in the year 1910, and one in the year 1911;

that on the last trip he stayed in Sweden for a period of nine

months, and that the defendant returned with him on

the same trip to the United States; that he did not show a month

later in Chicago; that the plaintiff learned of the existence of

defendant sometime in the year 1909 or 1910, and that she was

never discovered in the year 1911, who located the defendant

living at 1212 North Clark Street in Chicago.

The evidence further tends to show that Johnson and

defendant rented a room in a rooming house in Chicago in October,

1911, where he informed her as his wife and where he visited

one or two or three times a week; that he would come in the afternoon

and stay until the next morning; that the defendant occupied

the room, a bedroom, and that the work of Johnson as her husband

was to look after the children.

The plaintiff testified that her husband and defendant

lived together in an apartment in the same town, Johnson,

Illinois, where the plaintiff resided, for a period of five

years and eight months. While it is included that Johnson and

plaintiff had never had their relations as husband and wife in the

year 1908, there is sufficient evidence in support of the fact

many of plaintiff that she and her husband lived together until

sometime in the year 1911 and that prior to this date the defendant

had sustained an illicit relationship with the plaintiff's husband. Plaintiff also testified that her husband for some years had been in business; that he was the owner of real estate and that his income was about \$5,000 a year; that he was paying her, at the time of the trial, \$50 a month for her support; that he lived with defendant in rooms situated above the store conducted by him in a building which he owned.

Plaintiff's husband testified that he and his wife, the plaintiff, did not live happily together; that as early as 1889 they quarreled and that she left him and went to Europe to her parents; that while she was absent he filed a bill for divorce against her; that she returned within a year and a half and that they went to live together again; that she had committed certain acts of violence against him, one in the year 1899 and one in 1909.

The evidence shows that Benson filed a bill for divorce against his wife in the year 1909; that plaintiff filed an answer thereto, and a cross-bill, and that the suit was either pending or dismissed at the time the present case was tried; Benson testified that he did not know whether he had procured a divorce from plaintiff or not, and he said: "I don't care either so long as I don't live with her." He denied that the defendant lived with him, but his cross-examination tended to weaken this part of his testimony.

On the whole evidence the jury were warranted in finding that the plaintiff's husband, without sufficient cause or reason, deserted her and for years thereafter lived in a state of adultery with the defendant. Witnesses who seem to have had no interest in the controversy, one of whom was friendly to defendant and plaintiff's husband, testified to the relationship which existed between defendant and Benson, and there is evidence in the record from which the jury might well conclude that

... maintained an illicit relationship with the plaintiff's wife ...
... testified that her husband for some years ...
... in business; that he was the owner of real estate and ...
... his income was about \$5,000 a year; that he was paying ...
... of the wife, \$50 a month for her support; that ...
... defendant in some respects above the other ...
... as a building which he owned.

... testified that he and his wife ...
... his wife, that she was heavily indebted; that as early as ...
... and that she was not able to pay her debts ...
... that while she was absent he took a bill for ...
... and returned within a year and a half ...
... to live separately; that she had committed ...
... in the year 1900 and was ...
... that Hanson took a bill for \$1- ...
... that plaintiff filed an ...
... and a cross-suit, and that the suit was other ...
... at the time the present case was tried; that ...
... that he did not know whether he had procured a di- ...
... "I don't care about ...
... "I don't live with her." He denied that the defendant ...
... but his cross-examination tended to weaken this ...
... of his testimony.

... on the whole evidence the jury were warranted in ...
... the plaintiff's husband, without sufficient cause ...
... for years thereafter lived in a ...
... defendant. Witness was seen to have ...
... in the controversy, one of whom was likely to be ...
... testified to the relationship ...
... between defendant and Hanson, and there is evi-

defendant and Benson, in bold defiance of the duty which Benson owed to plaintiff and of every rule of decent and moral conduct, lived together as though they were man and wife. Benson's assertion, made in the interest of defendant, that he had no affection or regard for his wife, is not conclusive of her right to bring her action against defendant.

In the case of Smith v. Gillap, 123 Ill. App. 121, it is said:

"It is not enough to prove in such case the fact of plaintiff's husband being infatuated with defendant, and that in consequence thereof his affections for his wife had grown cold, but it is necessary to show that the person who is charged with wrong was the blamable party, and that by some acts or words, had wilfully and wrongfully sought and succeeded in alienating the affections."

The evidence tends to prove that plaintiff's husband and the defendant were infatuated with each other and that the defendant lived for a period of more than five years in the same town with plaintiff, occupying an apartment with plaintiff's husband. Whether she or plaintiff's husband was the blamable party might be difficult to determine, that is, if it can be said upon this record that only one of the parties was, in fact, blameworthy. It is quite conceivable that both plaintiff's husband and the defendant were responsible for the relations which existed between them. Clearly, defendant must have known that her continued relations with Benson would naturally tend to alienate him from his wife and family, who had the legal right to his association and support; and the jury, under the circumstances, were warranted in finding that the defendant's conduct caused in some measure the separation which occurred between plaintiff and her husband. The plaintiff cannot be precluded by her husband's assertion in the interest of his paramour that he had no affection for his wife, who testified that she was ready and willing to live with him.

defendant and herself, in a statement of the only other person
over to plaintiff and of every rule of decency and moral conduct.
first defendant is shown that she was not with defendant's son
service, and in the interest of defendant, that he had no af-
fection or regard for his wife, is not conclusive of her right
to bring her action against defendant.

In the case of Smith v. Smith, 133 Ill. App. 420, 191.

It is not enough to show to prove to such case the fact
of defendant's husband being interested with defendant, and
that is a matter which should not be a question for the jury to
decide, but it is necessary to show that the person who
is charged with the duty was the plaintiff's wife, and that by
such acts of wife, had willfully and intentionally sought and
procured in defendant's wife.

The defendant's husband is a man of good character.

and the defendant were interested with each other and that
the defendant lived for a period of more than five years in the
same town with plaintiff, though was in agreement with plaintiff
regarding the defendant's husband was the plaintiff's
wife, and it is difficult to determine, but it is to be said
that the defendant was only one of the parties was, in fact, plaintiff's
wife. It is quite conceivable that both plaintiff's husband and
the defendant were responsible for the relations which existed be-
tween them. Clearly, defendant must have known that her conduct
relations with defendant would naturally tend to alienate him from
his wife and family, who had the legal right to his affection
and support; and the jury, under the circumstances, were authorized
to find that the defendant's conduct caused in some measure
the separation which occurred between plaintiff and her husband.
The plaintiff cannot be precluded by her husband's assertion in
the interest of his harmony that he had no reason for his
wife, who testified that she was ready and willing to live with

In Stewart v. Faggerty, 251 Pa. 603, the court said:

"In order to sustain this action there must be some evidence from which the conclusion can be drawn that the defendant was the pursuer and not merely the pursued."

We think there is some evidence in this record which tends to show that the defendant was an active inducing cause of the loss to plaintiff of her husband's affection, society and support.

In a case involving facts similar to those shown by the evidence in the case at bar, the law will presume that the loss by a plaintiff of her husband's society is a direct consequence of such acts.

In Miller v. Pearce, 86 Vt. 323, the court said:

"It is manifest, therefore, that the only difference between alienation by persuasion and alienation by adultery is that in the former you must prove resultant loss of consortium, while in the latter the law conclusively presumes it."

"In Hart v. Knapp, 76 Conn. 135, one woman shed another woman for alienating the affections of her husband by committing adultery with him. The defendant claimed in bar of recovery that she did not seduce plaintiff's husband, but that he seduced her; but the court held that that made no difference, and the plaintiff had judgment, and on a ground from which it may be deduced that carnal knowledge of the husband is as much a civil injury to the wife, as carnal knowledge of the wife is a civil injury to the husband."

Other errors complained of are not sufficiently serious, if they exist, to warrant a reversal of the judgment.

The judgment of the trial court will be affirmed.

AFFIRMED.

57 - 24344

ADELINE M. DICKINSON,
Defendant in Error.

vs.

DWIGHT W. DICKINSON,
Plaintiff in Error.

213 I.A. 672

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

December 10, 1914, Adeline M. Dickinson filed her bill for divorce in the Superior Court of Cook County, alleging therein that she had been a resident of the State of Illinois continuously for "more than a year last past," and in which bill she charged the defendant, her husband, with drunkenness. This bill was dismissed in March, 1917, on motion of complainant for the reason, as asserted in the brief of counsel for defendant, that complainant had not resided in the State of Illinois for the period of time prescribed by the statute.

March 15, 1917, the complainant again filed a bill against the defendant, in which she sought the same relief as prayed in the former proceedings. November 16, 1917, the complainant by leave of court filed an amended bill of complaint in which she alleged that she was married to defendant March 10, 1896, in the State of Massachusetts; that they lived together until August 1, 1913; that one child was born of the marriage; that defendant was the owner of property of the value of about \$12,000 and received an income from his business as a dentist of \$3,000 to \$4,000 a year; that defendant was without means to support herself and child; that he had treated her with extreme and repeated cruelty; that for six years next preceding the filing of the original bill of complaint defendant had been guilty of

2181A.673

THE UNITED STATES OF AMERICA

IN SENATE

January 10, 1917

REPORT

OF THE

COMMISSIONER OF THE GENERAL LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

ON MAY 1, 1916, RELATIVE TO THE LANDS OF THE

UNITED STATES IN THE TERRITORY OF ARIZONA

AND THE LANDS OF THE TERRITORY OF NEW MEXICO

AND THE LANDS OF THE TERRITORY OF COLORADO

AND THE LANDS OF THE TERRITORY OF UTAH

AND THE LANDS OF THE TERRITORY OF IDAHO

AND THE LANDS OF THE TERRITORY OF MONTANA

AND THE LANDS OF THE TERRITORY OF WYOMING

AND THE LANDS OF THE TERRITORY OF NEVADA

AND THE LANDS OF THE TERRITORY OF CALIFORNIA

AND THE LANDS OF THE TERRITORY OF ARIZONA

AND THE LANDS OF THE TERRITORY OF NEW MEXICO

AND THE LANDS OF THE TERRITORY OF COLORADO

AND THE LANDS OF THE TERRITORY OF UTAH

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AND THE LANDS OF THE TERRITORY OF WYOMING

AND THE LANDS OF THE TERRITORY OF NEVADA

AND THE LANDS OF THE TERRITORY OF CALIFORNIA

AND THE LANDS OF THE TERRITORY OF ARIZONA

AND THE LANDS OF THE TERRITORY OF NEW MEXICO

habitual drunkenness; that he used morphine to excess; that he was an unfit and unsafe person to live with or to have the care, custody and education of their child; that for the reasons charged she was compelled to leave the defendant on August 1, 1913, and that he, defendant, thereby became guilty of deserting complainant, which desertion continued for a period of two years and upward previous to the filing of the bill of complaint.

The answer of the defendant denied the charges of wrong doing made against him in the bill, and he alleged therein that the complainant did not conduct herself toward him as a good and virtuous wife; that she had abandoned him and traveled throughout the United States and had gone to Chicago and filed a bill for divorce against him after one month's residence therein. He denied ownership of any real estate or personal property whatsoever. The answer alleged that defendant's income from his profession is not more than \$50 a month; that he is unable to supply necessities for his wife and child while complainant lives away from her home in Massachusetts, and that he is ready and willing to support both complainant and their child in the home where he now lives.

The record discloses that on February 1, 1918, the trial court, upon its own motion, dismissed the bill of complaint for want of equity and that on February 2, 1918, the order of dismissal of February 1, 1918, was vacated and set aside. February 9, 1918, the cause was advanced for trial and set down for hearing on February 14, 1918. February 18, 1918, a decree was entered in favor of the complainant, by which decree the court found that "the complainant is entitled to the custody and education of the child and to an allowance for the support and maintenance of said child, and solicitor's fees." The decree dissolved the bonds of matrimony existing between complainant and defendant and ordered the defendant to pay complainant the sum of \$25 each

...the defendant, that he was unwilling to proceed; that he was
...to give him a party; he gave him a party; he gave him a party;
...of their child; that for the purpose of saving
...to leave the defendant on January 1, 1915, and
...thereby become guilty of harboring fugitives
...for a period of two years and the
...to the filing of the bill of complaint.

The answer of the defendant denied the charges of
...and against him in the bill, and he alleged that
...did not conduct himself toward him as a
...and that she had abandoned him and turned
...the latter leaves and went to Chicago and filed a
...against him after one month's residence there.
...of any real estate or personal property which
...The answer alleged that defendant's income from his
...is not more than \$50 a month; that he is unable to
...for his wife and child while complainant
...from her home in Massachusetts, and that he is ready
...to support both complainant and their child in the
...he may live.

The record discloses that on February 1, 1915, the
...court, upon its own motion, dismissed the bill of complaint
...of equity and that on February 3, 1915, the order of
...of February 1, 1915, was rescinded and set aside. There-
...the cause was removed for trial and set down for
...on February 24, 1915. February 18, 1915, a decree was
...in favor of the complainant, by which divorce and custody
...the complainant is entitled to the custody and control
...and so an allowance for the support and maintenance
...and defendant's child. The answer admitted
...existing between complainant and defendant
...to pay complainant the sum of \$250 each

month until the further order of the court and to pay her a further sum of \$75 for solicitor's fees.

The defendant insists that the decree of the trial court should be reversed for the reasons principally that the court abused its discretion in advancing the cause for trial, that the court admitted improper evidence on behalf of complainant, and that the evidence admitted does not sustain the decree.

While there is some dispute between the parties as to when the complainant came to Chicago, we think the evidence shows that she took up her residence in this city in August, 1913. Whatever may be the fact as to this matter, the evidence does disclose that she was a resident of Chicago for more than two years next preceding the filing of the bill which is before us on this appeal. It is in evidence that the defendant on September 11, 1917, filed a bill of complaint against the complainant in the Superior Court of Middlesex County, Massachusetts, in which he charged her with desertion.

It is insisted that the court erred in advancing the cause for trial. The granting of a motion of this sort generally rests in the sound discretion of the trial court. An examination of the record discloses that the complainant sought, beginning February 1, 1918, to advance the cause to an early hearing. On February 9th the court set the case down for trial on February 14, 1918. We are not convinced that this action on the part of the court constituted an abuse of its discretion. The cause was, in fact, tried on February 18, 1918, about five years after the parties had separated and nearly one year after the bill of complaint was filed. The record discloses that the defendant had sufficient time to prepare his case for trial and to procure such depositions as he might desire to have taken before the trial. In support of a motion for a continuance of the cause certain affidavits

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The defendant ... the ... of the ...

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were filed by the defendant, which were by agreement read in evidence in the cause.

The charges in the amended bill are that the defendant was guilty of extreme and repeated acts of cruelty toward the defendant, of habitual drunkenness and of desertion. The complainant testified to several acts of cruelty on the part of defendant toward her. She testified, "He hit me over the head. * * * He made threats against my life. He carried a revolver and said he would blow my brains out." On the trial of the cause the defendant introduced in evidence two former bills filed by the complainant against defendant, and it is asserted that these two bills could be used in toto as evidence against him. While the record does not disclose that these bills were when introduced in evidence limited to a special purpose, we are not ready to admit the contention that all of the sworn statements made by the complainant in the bills are admissible in evidence against the defendant.

It is asserted that the evidence heard in the trial court is insufficient to sustain the decree. In Molner v. Molner, 186 Ill. App. 234, it was held that in a contested divorce case, that is, a case where trial is had and issues joined by bills, answers and replication, the weight of the testimony is the thing to be considered, even though the issues be determined in favor of a party having but one witness. The charges of drunkenness and desertion made in the bill find support in the evidence from the testimony of more than one witness. Three witnesses, including the complainant, testified to conduct on the part of the defendant which, if true, authorized a finding that he had been guilty of drunkenness for two years next preceding the time the parties ceased to live together as man and wife. A brother of complainant testifying to the habits

testimony by the defendant, which was by agreement read in

evidence in the case.

The charges in the amended bill are that the de-

fendant was guilty of extreme and repeated acts of cruelty
toward the plaintiff, of habitual drunkenness and of desertion.

The plaintiff testified on several occasions on the
trial at different points, that she testified, she did not know
the defendant, and that she made known to the jury, she did not

know a witness and that he would not be present on
the trial of the case. The defendant introduced in evidence
the letter which was filed by the complainant against the defendant,
and it is admitted that these two bills should be read in
evidence against him. While the record does not disclose

that these bills were when introduced in evidence limited to a
certain extent, we are not bound to admit the admission that

all of the bills introduced by the complainant in the

bills are admissible in evidence against the defendant.

It is asserted that the evidence heard in the

trial case is insufficient to establish the charges. In People

v. Coffey, 188 Ill. App. 234, it was held that in a contested

divorce case, that is, a case where trial is had and issues

presented by bills, answers and replies, the record of the

trial is the thing to be considered, even though the issues

are presented in favor of a party having had one witness. The

question of drunkenness and desertion made in the bill and

the evidence from the testimony of more than one witness

and three witnesses, including the complainant, testified to

conduct on the part of the defendant which is true, established

a finding that he had been guilty of drunkenness for two years

and preceding the time the parties agreed to live together as

man and wife. A brother of defendant testified to the fact

of defendant, said: "Most every time I saw him he was under the influence of liquor, sometimes slightly, other times greatly, when he would recognize nobody. * * * When I would go to his house he was generally so full of liquor that he would lie down and would not speak to anybody." This witness testified that he had met the defendant once or twice a week for two years before the separation between complainant and defendant. This testimony is corroborated by that of other witnesses. The complainant testified to acts of cruelty committed by the defendant. These acts, taken together with the evidence of drunkenness, would constitute sufficient grounds upon which to base the charge of desertion against the defendant. The evidence introduced on behalf of complainant is ample to sustain the charges of the bill, and while some of this evidence is strongly contradicted by that introduced by the defendant, we are unable to say that the decree entered by the trial court is not sustained by a preponderance of the evidence admitted. No reversible error was committed by the trial court in its rulings upon the admission of evidence.

The decree of the Circuit Court is affirmed.

AFFIRMED.

182 - 24529

ALBERT H. EASTMAN,
Appellee,

vs.

A. MILLER BELFIELD,
Appellant.

213 I.A. 673

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

Plaintiff, Albert H. Eastman, brought suit against defendant, A. Miller Belfield, in the Municipal court of Chicago to recover a judgment against defendant on the promissory note following:

"\$200.00 Chicago, Ill., April 1st, 1915.
On or before eighteen months after date I promise to pay to the order of South Orchards Utilities Co.....Two Hundred & 00/100.....Dollars at Room 900, 108 South LaSalle Street, Chicago, Ill. Value received with interest at the rate of seven per cent. per annum, payable annually.
No. 3. Due on or before October 1, 1916.
A. Miller Belfield."

The note bore the following endorsements:

"Interest paid to Sep. 23, 1915.
S. S. S. Co.
A. H. E.
South Orchards Utilities Company, by
W. B. Wheelock, Vice-President."
"May 8, 1917, Paid on account, \$25.00."

A statement of claim filed in the cause alleged that the note was endorsed in blank by the payee and was negotiated before maturity for a valuable consideration, and without notice of any defense, to the plaintiff. From an examination of the affidavit of merits filed in the cause and the evidence introduced on the trial it is gathered that the defendant insisted for his defense to the action that plaintiff had made certain false representations as the result of which the note was executed and delivered by defendant.

The evidence tends to prove that the South Orchards

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Company, prior to the year 1915, was the owner of a tract of land in Alabama which it subdivided into 155 five acre lots, which lots were thereafter sold to different persons, one of whom was the defendant. In transferring these lots the grantor, South Orchards Company, retained title to certain boulevards or roadways surrounding the property, as shown by a recorded plat, which consisted of 140 acres.

Following the transfer of the lots certain purchasers thereof organized the South Orchards Utilities Company, which company purchased the roadways in question and the lot owners were requested to buy one share of stock in the new company for each lot owned by them. The South Orchards Utilities Company paid the sum of \$15,500 as purchase price for the roadways, which sum was paid by the execution and delivery of four promissory notes, the payment of which was secured by the delivery, as collateral, of stockholders' notes given by stockholders for shares of stock in the Utilities Company. The Utilities Company was organized in April, 1915, and the deal for the purchase of the roadways was consummated in November or December of that year.

Eastman, the plaintiff, was an officer of the South Orchards Company and at one time a director of the Utilities Company. He did not, however, take any part in the transaction, as director of the Utilities Company, in the purchase of roadways.

The defendant gave his promissory note for \$200 in payment for two shares of the capital stock of the Utilities Company, which note was dated April 15, 1915, and became due on or before eighteen months after date. It was made payable to the order of the Utilities Company and bore interest at the rate of 7 per cent per annum. The evidence shows, however, that the note was not delivered until September 23, 1915; payment for the in-

terest accruing thereon up to that time was endorsed on the note. On December 30, 1915, two shares of stock were issued to defendant and his note was then delivered by the Utilities Company to the South Orchards Company in part payment for the lands purchased by the Utilities Company.

The evidence further tends to show that the South Orchards Company was indebted to the plaintiff in a large sum and that it in turn turned over the note in question to him in part payment of this indebtedness. In May, 1917, the defendant paid to plaintiff the sum of \$25 on the note, at which time he wrote to the plaintiff: "I will endeavor to send you a check every month from now on until the matter is taken care of." No further payments were made by defendant on the note, and suit was begun and judgment was entered in the Municipal court in favor of the plaintiff for the sum of \$205.05, to reverse which judgment the defendant has appealed to this court.

To sustain the charge that the note was procured from defendant by false representations, it is insisted that the Utilities Company sent out a notice in April, 1915, which stated that the company "now owns the land in fee simple"; that at this time the plaintiff was a director of the Utilities Company and an officer of the South Orchards Company; that in September, 1915, while he still held both positions, the plaintiff induced defendant to subscribe for the shares of stock in the Utilities Company and that the plaintiff then said that only a few, perhaps two or three, of the 155 lot owners in the South Orchards Company had failed to subscribe to the stock of the Utilities Company; that the Utilities Company did not, in fact, acquire title to the land in question for several months after the representations were made and that it paid for the same by the delivery of its notes; that the South Orchards Company still holds claims against the Utilities Company and that

...and his note was then delivered by the Utilites Company to
the South Groceries Company in full payment for the lands purchased
by the Utilites Company.
The Utilites Company further found to show that the Utilites
Company was indebted to the plaintiff in a large sum and
that it in turn turned over the note in question to him in full
payment of this indebtedness. In May, 1917, the note was paid
to the plaintiff the sum of \$500 on the note, at which time he wrote to
the defendant: "I will endeavor to send you a check every month
that you will until the money is taken care of." He further pay-
ments were made by defendant on the note, and this was begun and
continued as entered in the Municipal Court in favor of the plain-
tiff for the sum of \$500.00, to reverse which judgment the defend-
ant has appealed to this court.
To sustain the charge that the note was given and trans-
ferred by false representations, it is insisted that the Utilites
Company sent out a notice in April, 1915, which stated that
the company "owns the land in fee simple"; that at this time
the plaintiff was a director of the Utilites Company and an
attorney of the South Groceries Company; that in September, 1915,
while he still held both positions, the plaintiff induced defendant
to subscribe for the shares of stock in the Utilites Company and
that the plaintiff then said that only a few, between two or three,
of the 100 owners in the South Groceries Company had failed to
subscribe to the stock of the Utilites Company; that the Utilites
Company was not, in fact, acquiring title to the land in question for
several months after the representations were made and that it paid
for the same by the delivery of its notes; that the South Groceries
Company still holds claims against the Utilites Company and that

the roadways land is in part still unpaid for; that the plaintiff failed to inform defendant that the Utilities Company did not own the land in fee simple at the time the note in suit was executed, and that at said time "there were a large number of lot owners who had failed to subscribe for stock in the said Utilities Company."

The defendant testified to certain statements and conduct on the part of the plaintiff which he insists amounted to false representations; his testimony in the main is directly contradicted by that of plaintiff, whose testimony is corroborated in some details by that of other witnesses. The evidence does show that Eastman resigned from the board of directors of the Utilities Company just before the consummation of the deal for the purchase of the roadways land.

While the evidence shows that all of the lot owners were not stockholders in the Utilities Company at the time the defendant purchased his stock, the evidence does disclose that a large number of such lot owners, more than a majority, had subscribed for the stock.

The defendant attended a meeting of the stockholders of the Utilities Company as late as February, 1916, and partial payment was made by him on the note as late as May 2, 1917.

On the whole evidence we think it was a question of fact for the trial court to determine whether the defendant, under the evidence, can be said to have delivered his note because of the alleged false representations which he insists were made by plaintiff. The testimony is contradictory as to this matter and there is some evidence which tends to support the position of the plaintiff that no such representations were made and that the defendant had full knowledge of the financial condition of the Utilities Company at the time he purchased his stock. Nor are

we inclined to hold, as a matter of law, even if the defendant's version of the transaction be accepted as true, that the representations were so materially false as to excuse him from liability on his note. While the notice referred to may have stated that the Utilities Company was the owner in fee simple of the roadways land, it is shown by the evidence that steps had been taken whereby it became evident that the title to the land was to become vested in the Utilities Company, and while the statement was technically untrue, the facts disclosed by the record show that the Utilities Company intended to and in fact did acquire title to the land within a few months after the delivery of the note by the defendant.

On the whole evidence we think the question of false representations was a matter of fact for the determination of the trial court, who was much better placed than are we to determine the truth of the matter.

The judgment of the Municipal court is affirmed.

AFFIRMED.

we looked at him, as a matter of fact, even in the testimony
of the transaction he seemed as true, that the witness
admitted that he certainly failed to answer him from liability
on his side. While the notice returned to me have stated that
the Utilites Company was the owner in the ship of the company
and it is shown by the evidence that some had been taken away
it is become evident that the title to the land was so become
vested in the Utilites Company, and while the statement was
incompletely correct, the facts stated by the record show that
the Utilites Company intended to and in fact did acquire title
to the land since a few months after the delivery of the same by
the defendant.

In the whole evidence to show the question of title
transmission was a matter of fact for the determination of the
trial jury, who was much better placed than we to decide
the facts of the matter.

The judgment of the appellate court is affirmed.

APPROVED.

FILED
JAN 11 1900
U.S. DISTRICT COURT
SOUTHERD DISTRICT OF NEW YORK
JAMES H. HARRIS, JR., CLERK

284 - 24635

G. H. CONEY, for use of
COLONIAL TRUST & SAVINGS
BANK,

Appellee.

vs.

C. C. MITCHELL & COMPANY,
a corporation,

Appellant.

213 I.A. 673

Appeal from

Municipal Court
of Chicago.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

A judgment was entered in the Municipal Court of Chicago in favor of G. H. Coney for the use of Colonial Trust & Savings Bank, to be designated hereinafter as "the bank," against the defendant, C. C. Mitchell & Co., a corporation, for the sum of \$5,852.20, and the defendant, garnishee in the suit, seeks to reverse this judgment by its appeal to this court.

The trial court found that on May 2, 1918, the defendant was indebted to G. H. Coney in the sum of \$29,500. The bank obtained a judgment in the Municipal Court on December 7, 1917, against Coney for \$5,829, and the present controversy is as to whether, at the time the garnishment proceedings were begun, the defendant was indebted to Coney on two promissory notes, each for the sum of \$14,750, one payable January 6, 1915, and the other July 6, 1915. Both notes were executed by defendant and delivered to Coney; endorsed upon the face of each was the following:

"This note is given as part of the purchase price of the business and assets of G. H. Coney & Co., as per contract between payee and makers of even date."

On July 3, 1914, the defendant purchased from Coney the assets and good will of a mortgage loan business

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which for some years prior thereto had been conducted by Coney under the name of G. H. Coney & Co. Under the terms of a written agreement executed by the parties for the sale of the business, the defendant agreed to pay certain liabilities of the business, aggregating \$91,185.93 and in addition thereto it agreed to pay him the sum of \$29,500, which last indebtedness was represented by the two notes referred to.

The notes were delivered to Coney in July, 1914, and remained in his possession until January, 1918, when he turned them over to the defendant. In testifying, Coney admitted that on the advice of his attorney he turned the notes over to defendant after the judgment had been entered against him in favor of the bank in order to protect defendant from liability thereon.

The loan business which Coney sold to the defendant was originally acquired by him from the bank by purchase.

G. C. Mitchell of the defendant corporation, G. C. Mitchell & Co., testifying concerning the execution of the contract for the sale of the business and the notes in question, said that his corporation took over all the assets and liabilities of a co-partnership business conducted by the witness and one Grubb, and also the business of Coney; that thereafter Coney became an employe of the defendant corporation, and was at the time of the trial a director and stockholder therein and its vice-president; that the notes in question were never paid to Coney.

It is gathered from the testimony of Coney and Mitchell and from the contract for the sale of the business that the defendant was to pay a part of the liabilities of G. H. Coney & Co., amounting to \$91,185.93, and that Coney was himself to pay his other liabilities. Mitchell, who

which for some years past...
...the name of J. H. Candy & Co. ...
...a written agreement executed by the parties for the sale of
the business, the defendant agreed to pay certain liabilities
of the business, aggregating \$25,000.00 and in addition therefor
it agreed to pay him the sum of \$50,000, which said indebtedness
was represented by the two notes referred to.

The notes were delivered to Candy in July, 1914, and
remained in his possession until January, 1915, when he turned
them over to the defendant. In January, Candy advised that
on the advice of his attorney he turned the notes over to
the defendant after the judgment had been entered against him in
favor of the bank in order to protect defendant from liability
thereon.

The fact business which Candy sold to the defendant
was originally acquired by him from the bank by purchase.
J. C. Mitchell of the defendant corporation, J. C.
Mitchell & Co., testifies concerning the execution of the
notes on the sale of the business and the notes in question,
and that his corporation took over all the assets and liabilities
of a partnership business conducted by the witness and one
Smith, and also the business of Candy; that thereafter Candy
became an employee of the defendant corporation, and when the
time of the trial a director and shareholder therein and the
vice-president; that the notes in question were never paid to

It is gathered from the testimony of Candy and
Mitchell and from the evidence that the sale of the business
that the defendant was to pay a part of the liabilities of
J. H. Candy & Co., amounting to \$25,000.00, and that Candy
was himself to pay the other liabilities. Mitchell, who

executed the notes, Coney, the payee, and John E. Cochran, present at the time of their execution, testified in substance, and their testimony seems to be uncontradicted, that the notes were delivered to Coney for the purpose of delivery to the bank in return for the surrender to Coney of certain trust receipts which had been executed by him and which represented an indebtedness to the bank of \$29,500. The President of the bank had agreed prior to the execution of the notes to accept them in lieu of the trust receipts. The bank ceased doing business about a week before the execution of the notes and the contract in question. Coney had prior thereto purchased the mortgage loan business from the bank which had agreed to extend him a line of credit of \$200,000; the closing of the bank deprived Coney of this credit and he transferred, as stated, his business to the defendant. To protect the good will of the business purchased by it and to prevent a legal action by the bank against Coney for the conversion of securities which had been delivered to him by the bank and for which he had executed the trust receipts, the defendant was much interested in the acceptance of the two notes by the bank. The bank refused to accept the notes from Coney and brought a suit against him, the basis of which was the conversion of the securities which had been delivered to him by the bank.

The evidence shows that at the time the business was sold to the defendant, or shortly thereafter, Coney took the notes to the bank and offered them in exchange for the trust receipts in the possession of the bank and which represented an obligation of Coney to the bank in the sum of \$29,500, the exact sum of the two notes. The bank refused to accept the notes in return for the trust receipts and they remained in Coney's possession, as hereinbefore stated, until delivered to the defendant.

The evidence shows that at the time the business was conducted by the defendant, or directly thereunder, money was loaned to the bank and other parties in exchange for the bank's notes. The bank refused to accept the notes from the bank and present a cash payment. The result of which was the conversion of the bank's notes which had been delivered to him by the bank.

The evidence shows that at the time the business was conducted by the defendant, or directly thereunder, money was loaned to the bank and other parties in exchange for the bank's notes. The bank refused to accept the notes from the bank and present a cash payment. The result of which was the conversion of the bank's notes which had been delivered to him by the bank.

It is further shown by the evidence that defendant made several demands upon Coney for the notes, and that he, Coney, said that his attorneys were holding them for use as evidence in the action brought against him by the bank.

It is our opinion that the charges of fraud and collusion made against the defendant and Coney are not supported by the evidence. The testimony of Coney and Mitchell, corroborated in part by that of the witness Cochran, that the notes were given to protect the defendant from the effects of any action which might be brought by the bank against Coney, appears to be uncontradicted. Certain circumstances shown by the evidence also seem to corroborate in some degree the testimony of these witnesses.

The notes delivered to Coney were for the same sum due the bank by Coney on account of the securities delivered to him by the bank and for which the trust receipts were executed. About a year after the execution of the notes, and while they were still in the possession of Coney, he borrowed from the defendant the sum of \$750, giving his note for the payment thereof, secured by the delivery, as collateral, of a certificate of membership of the Chicago Real Estate Board, one of the South Shore Country Club and a share of the capital stock of C. C. Mitchell & Co. Coney made two payments of \$100 each on this note.

There can be no doubt, if the uncontradicted evidence in the record is taken as our guide, that the notes were delivered to Coney in pursuance of a special agreement between him and defendant. This is not an action between the payee and the maker of a promissory note, nor is it a suit begun by one who has obtained the note for a valuable consideration before maturity and without notice of any defense which might be pleaded to an action thereon.

It is further shown by the evidence that defendant
and several persons upon whom money for the notes, and that he
they, said that his attorneys were holding them for use as
collateral in the action brought against him by the bank.
It is our opinion that the charges of fraud and
collusion made against the defendant and money are not supported
by the evidence. The testimony of money and the other
witnesses is that at the time defendant, that the notes
were given to protect the defendant from the effects of any
also that might be brought by the bank against money, appears to
be uncontroverted. Certain circumstances shown by the evidence
also seem to indicate in some degree the testimony of these
witnesses.
The notes delivered to money were for the same sum
and were used by money on account of the securities delivered to
him by the bank and for which the first receipts were executed.
About a year after the execution of the notes, and while they
were still in the possession of money, he borrowed from the
defendant the sum of \$750, giving him note for the payment
thereof, secured by the delivery, as collateral, of a certificate
of ownership of the Chicago Hotel business, one of the four
made by the Chicago Club and a share of the capital stock of U. C.
Alexander & Co., money made two payments of \$100 each on this
note.
There can be no doubt, if the uncontroverted evi-
dence in the record is taken as our guide, that the notes were
delivered to money in pursuance of a special agreement between
him and defendant. This is not an action between the notes and
the bank. A promissory note, now in a suit begun by and
who has obtained the note for a valuable consideration before
maturity and without notice of any defense which should be pleaded
to the action.

The trial court properly permitted the defendant to show that the delivery of the notes to Coney was conditioned upon his agreement to deliver them to the bank in return for the trust receipts. The parties to the notes never intended that Coney, the payee, named therein was to have any right of action thereon; he was merely permitted by the agreement to deliver them to the bank, otherwise they were to be returned to the defendant, the maker.

In the case of Straus v. Citizens Bank, 254 Ill. 185, it was held that the payee named in a note could not recover thereon against the maker where it appeared from the evidence that an agreement existed between the parties whereby the maker of the note was not to be called upon to pay it. The decision in that case which affirmed a decision of the Appellate court, 169 Ill. App. 420, is based on the fact that the note between the parties was without consideration. In the Appellate court decision it was held that sections 16 and 58 of the Negotiable Instruments Act operated to change a rule previously existing in Illinois so that conditions attaching to the delivery of a promissory note may be established by parol evidence, and the court, on page 431, said:

"To require the conditions attaching to the delivery of the note to be shown by documentary evidence would, in our judgment, entirely defeat the purpose of the sections above quoted. We are of the opinion that where the circumstances described in said sections exist it is the intention of said statute that the actual facts may be shown by oral testimony."

It is conceded that the notes were returned to defendant by Coney under circumstances which showed that he had relinquished any right which he might have had thereto. The notes were cancelled and it is difficult to understand how, under the circumstances, any rights to, or under, the notes could accrue to the bank which had directly refused to accept them in lieu of the trust receipts. The evidence fails to establish that Coney

When trial court properly instructed the jury that to
 establish the delivery of the notes to Cony was a condition
 precedent to the delivery of the notes to the bank in return for the
 loan, the parties to the notes were intended that
 Cony, the payee, named therein was to have the right of action
 against the bank, and the agreement to deliver them
 to the bank, whether they were to be returned to the defendant,
 or not, was a condition precedent to the delivery of the notes.
 In the case of Cony v. Oklahoma Bank, 200 P.2d 111,
 it was held that the payee named in a note could not recover
 against the bank unless the note was delivered to the bank.
 That no contract existed between the parties whereby the bank
 at the time was not to be called upon to pay it. The intention
 of the parties was to deliver the note to the bank and not to
 the payee which entitled a decision of the court was correct.
 The bank, then, is bound on the fact that the note between the
 parties was without consideration. In the appellate court, the
 bank is not held that section 10 and 11 of the Uniform
 Code are operated to change a rule previously existing. This
 is at that condition attaching to the delivery of a promissory
 note may be established by parol evidence, and the court, on
 the facts of the case, held that the condition attaching to the delivery
 of the note to be shown by documentary evidence would, in our
 opinion, entirely defeat the purpose of the section above
 quoted. The rule of the opinion that when the witness
 testified in said section that it is the intention of said
 statute that the actual facts may be shown by oral testimony.
 It is concluded that the notes were returned to de-
 fendant by Cony under circumstances which show that he had re-
 linquished any right which he might have had therein. The notes
 were delivered and it is difficult to understand how, under the
 circumstances, any right to, or under, the notes could survive
 to the bank which had directly refused to accept them in lieu of
 the trust receipts. The evidence fails to establish that Cony

and Mitchell had colluded with each other to defraud the bank. The evidence shows that the defendant was not indebted to Coney at the time the garnishment proceedings were begun. As a legal consequence of this, Coney's creditors had no legal claim against the defendant. Richardson v. Lester, 83 Ill. 55.

In Hibernian Banking Association v. Morrison, 188 Ill. 279, the Supreme court said:

"The general rule is that a judgment creditor garnisher cannot recover from a garnishee anything which the judgment debtor could not himself recover."

The evidence in the record shows that the notes were delivered under the terms of a special agreement which provided that the maker was not to be liable thereon until and unless the special agreement was performed by the payee named in the notes. It is not shown that this agreement was in fact performed. It follows necessarily from this that the judgment of the trial court must be reversed and a judgment entered here in favor of defendant.

Reversed and judgment of nil capiat entered here.

REVERSED AND JUDGMENT HERE.

SUGAR BROTHERS COMPANY, Ltd.,
of Monroe, Louisiana,
Appellee,

vs.

THE MAHAFREY COMPANY, a
corporation,
Appellant.

213 I.A. 673

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the Municipal court in favor of the plaintiff for the sum of \$1,740.

May 2, 1916, Austin, Trousdale & Proffit, brokers, of Monroe, Louisiana, wrote to defendant, a commission merchant of Chicago, to inquire the price at which defendant would be willing to sell "Triumph" potatoes for January and February, 1917, delivery. Defendant answered by wiring:

"We would be willing to take future orders from good parties at \$1.04 sacked, delivered."

Following this telegram the brokers wrote defendant:

"We have booked Sugar Bros. half a car of Cobblers and half a car of Triumphs and one carload of Triumphs, all at \$1.04 sacked, delivered Monroe, to be shipped by March 1, 1917. * * *

"All these buyers think that you should guarantee this price against your own decline, up to a reasonable time, and if you can do this, advise us and so state in the contract. If you cannot guarantee against decline, please send contract, anyway, and we will do our best to have them sign and return immediately to you. The Monroe Grocery Company will also book several cars if you can see your way to guarantee the price."

May 16, 1916, following the receipt of this communication, the defendant wrote to Austin, Trousdale & Proffit as follows:

"We are enclosing you contracts covering orders you have given us for Triumphs for later shipment. Kindly have the parties sign one copy and return to us, if acceptable,

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THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

INVESTIGATION OF THE

RECORDS

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

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Think it would be best to have them thoroughly understand that we could not guarantee them against any decline in the market any more than we could ask them to pay any advance in the market, or, in other words, prices made would be binding on both sides regardless of the market at the time of shipment. Would like to have them thoroughly understand this, so there will be no question arising then."

May 22, 1916, the defendant mailed the brokers certain other contracts in duplicate covering purchases made by plaintiff, and instructed the brokers to "kindly have one copy of each contract signed and returned to us without delay." No question is raised by this record with reference to the contracts of May 22, 1916. B. J. Sugar of Sugar Brothers Company, plaintiff, testified that Mr. Trousdale of the brokerage firm of Austin, Trousdale & Proffit, brought the contract in question to his, Sugar's, office four or five days following a conversation had by the witness with Trousdale prior to May 16, 1916; that he, the witness, signed the contract in duplicate; that he delivered one copy to Mr. Trousdale and that no potatoes were delivered on this contract. The witness testified that seven or eight months after the making of the contract of May 16, 1916, he made a demand for delivery under the contract "through the broker and not getting satisfaction in that way I wired them myself." The evidence shows that the defendant did not receive at any time the duplicate copy of the contract of May 16, 1916, which B. J. Sugar says was delivered to Mr. Trousdale.

On January 2, 1917, the defendant wrote the brokers with reference to shipments for Sugar Brothers Company as follows:

" * * * "We find that on May 16th we received a letter from you asking us if we could guarantee Sugar Bros. and Southern Grocery against decline in market. If not to send contract any way and try to get them to sign. We mailed these contracts to you, but according to our records they never were completed, but on May 23rd we mailed you two other contracts on your request which are the orders we have on our books for them."

On January 4, in response to this letter the brokers wrote as follows:

" * * * "Sugar Brothers accepted the contracts as you sent them, signed them and they were returned to you. They asked that you protect them against decline but when you did not agree to do it they accepted the potatoes without any guarantee. Under the circumstances it looks like there is no question but what you are under contract to deliver these potatoes."

Other evidence and correspondence appearing in the record shows that the defendant never received the duplicate contract of the copy which B. J. Sugar says he delivered to Trousdale, and from this evidence it is not inconceivable that the defendant was of the opinion that the contracts of May 16 and May 22nd 1916, were intended to cover the same shipments.

So far as we are able to discover from an examination of the evidence, no effort was made to close the alleged May 16, 1916, contract for a period of seven or eight months, and it fairly appears that the defendant had no knowledge of the alleged signing and delivery of this contract to Trousdale. Assuming that the plaintiff executed the contract as stated, and that he delivered a duplicate of it to Trousdale, the query is whether the failure to deliver back this duplicate to defendant would excuse defendant from complying with its terms. We are inclined to believe that it would. An examination of the evidence which refers to the relations of the brokers to the plaintiff and the defendant and the character of the brokers' business, leads to the conclusion that he could not be regarded as the agent of the seller in closing the contract.

The negotiations were begun by the brokers, who assumed to be acting for persons whom they describe as their customers. Both plaintiff and the brokers carried on business at or near Monroe, Louisiana, and defendant's place of business was at Chicago, Illinois.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said Court at Chicago, Illinois, this 1st day of January, 1910.

That the said Court, in its said opinion, has found that the said defendant, in the said contract, has acted in a fraudulent and dishonest manner, and that the said plaintiff has been injured by the said defendant's conduct.

That the said Court, in its said opinion, has found that the said defendant, in the said contract, has acted in a fraudulent and dishonest manner, and that the said plaintiff has been injured by the said defendant's conduct.

That the said Court, in its said opinion, has found that the said defendant, in the said contract, has acted in a fraudulent and dishonest manner, and that the said plaintiff has been injured by the said defendant's conduct.

That the said Court, in its said opinion, has found that the said defendant, in the said contract, has acted in a fraudulent and dishonest manner, and that the said plaintiff has been injured by the said defendant's conduct.

That the said Court, in its said opinion, has found that the said defendant, in the said contract, has acted in a fraudulent and dishonest manner, and that the said plaintiff has been injured by the said defendant's conduct.

That the said Court, in its said opinion, has found that the said defendant, in the said contract, has acted in a fraudulent and dishonest manner, and that the said plaintiff has been injured by the said defendant's conduct.

While the witness Trousdale attempts to say that he was acting as the representative or agent of the defendant, other evidence introduced upon the trial indicates that this was not the fact. There is some contradiction in the evidence, but it fairly appears therefrom that the brokers had for some years acted as middlemen in the sale of merchandise to persons, many of whom resided in or near Monroe, La. The evidence does not show that the brokers were authorized to enter into contracts on behalf of the defendant. As stated, the brokers initiated the correspondence which resulted in the delivery of the contracts to them on May 16, 1916, for execution. This correspondence shows that they had only a special authority to procure the execution by the plaintiff of the contract, and, if successful, to return a duplicate copy to defendant.

Argument is made in the briefs filed as to whether the brokers were the agents of the defendant, and whether it can be said on the evidence that a complete and binding contract between the parties was entered into on May 16, 1916. The answer to both arguments turns upon whether the defendant by its correspondence and course of dealings with the brokers and the plaintiff had authorized either the plaintiff or the brokers to regard the contract as complete before the return of the duplicate copy.

The burden of proving the execution of the contract in the first instance rested upon the plaintiff, and it was incumbent upon it to prove that the written contract, upon which the suit was brought, was executed and delivered. The whole controversy then turns upon whether the delivery of the duplicate of the contract to Trousdale constituted, in law, a delivery to defendant.

It is not disputed that

defendant's letter of May 16, 1916, directed the brokers to "kindly have the parties sign one copy and return to us, if acceptable."

In testifying as to the brokers' method of business,

Trousdale stated:

"Well, in some instances I would get prices at suggestion of buyer and then submit them.

"I got these quotations from several people. The Mahaffey Company, L. Starks Company, Barnett. It was my business to get the best prices I could. Getting these prices and then selling to my customers is the way I made my living."

At another point in his testimony he said:

"I can't answer specifically, but I will say that every spring, for several years, we bought seed potatoes from The Mahaffey Company - that is, I didn't buy them, but the trade I represented bought them - the people I did business with; the people in Monroe, Louisiana, bought seed potatoes every spring. * * * I don't know whether Mr. Sugar asked me for prices or whether I submitted them to him."

Mr. Sugar testified as follows:

"I asked the broker to give me prices and he would secure prices, by telegraph or correspondence."

The correspondence and negotiations which led to the mailing of the contracts of May 16, 1916, was begun by Mr. Sugar's application to the brokers for prices of potatoes. The brokers in turn made inquiry as to prices from defendant, who, in answer to this inquiry mailed the copies of the contracts with express instructions to return the duplicate copy to the defendant if and when executed.

The brokers' action was brought about in the first instance by the plaintiff, whose instructions they seem to have followed. They rendered no bill for their services to the defendant, nor, so far as the evidence shows, did they at any time claim compensation of defendant for such services. We think it was an essential part of the contract that defendant was to be notified of its acceptance. It is clear that the duplicate copy

of persons and animals, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 25

was not returned to defendant and it had no knowledge whatsoever of the claim of plaintiff for seven or eight months following May 16, 1916. Defendant had no relation with the brokers other than that shown by the correspondence in question and that referred to in the testimony of Trousdale. Under the facts shown by this record the defendant cannot be said to have entered into a binding, enforceable contract with plaintiff. Nothing in the evidence tends to show that the parties intended that the contract was to be regarded as complete before the delivery of the duplicate copy thereof to defendant. Grozier v. Grozier, 201 Ill. App. 406.

The judgment of the Municipal court will be reversed and judgment of nill capiat entered here.

REVERSED AND JUDGMENT HERE.

was not returned to defendant and it had no independent knowledge
of the claim of plaintiff for money or other things following
May 12, 1914. Defendant had no relation with the persons other
than that shown by the correspondence in question and that no
further is in the testimony of witnesses. Under the facts shown
it was found that the defendant cannot be said to have received into
a deposit, or otherwise, money or other things, or to have
retained the same, or to have used the same, or to have
lent or to have expended the same, or to have delivered the same
except as is shown by the evidence. Plaintiff's claim is not proved.

VERDICT FOR DEFENDANT.

392 - 24745

MERICHIA TURNER.

Appellee.

vs.

W. B. LLYES doing business as
W. B. LLYES & SON, and THOMAS
QUICKEY doing business as ACME
FURNITURE & STORAGE COMPANY.
Appellants.

213 I.A. 673

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

The defendant W. B. Llyes, doing an express business as W. B. Llyes & Son, was sued in the Municipal court of Chicago for the conversion of certain household chattels, the property of the plaintiff.

The evidence shows that the plaintiff contracted with the defendant for the storage of the chattels in question on October 18, 1915; that plaintiff subsequently, at different times, paid to defendant a total sum of \$15.00 for ten months storage of the goods, being at the rate of \$1.50 a month. The plaintiff testified that the defendant had, without her knowledge or consent, stored the chattels with another storage company and that they had subsequently been sold, without notice to her, for unpaid storage charges.

October 26, 1915, the defendant, in reply to a letter from plaintiff dated October 18, 1915, wrote plaintiff a letter addressed to her home address, 1809 Locust street, Kansas City, Mo., stating therein that he would store the chattels "in our storage at the rate of \$1.50 per month beginning August 14th, 1915."

There is some dispute in the evidence as to whether the defendant had notified the plaintiff of the fact that he had

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The evidence shows that the plaintiff's contention with
the defendant for the return of the property in question on or
about the 1st day of January, 1913, was not sustained.
The defendant's claim for the return of the property
is not sustained, being at the rate of \$1.00 a month. The plaintiff
testifies that the defendant had, without her knowledge or con-
sent, placed the property upon another storage company and that
the property was sold, without notice to her, for un-
der the terms of the contract.

October 28, 1913, the defendant, in reply to a letter
from the plaintiff dated October 15, 1913, wrote plaintiff a letter
stating that he had not received the property and that the
plaintiff should not expect to receive the property in the
future at the rate of \$1.00 per month beginning August 1913.

There is some dispute in the evidence as to whether
the defendant had notified the plaintiff of the fact that he had

stored the goods with another company and that the goods had been sold to pay the storage charges. The defendant testified that he kept the chattels in the rear of his store after a railway company had informed him that it would not ship the goods to plaintiff unless the freight charges were prepaid; that he, the defendant, had not known the plaintiff in the transaction, but that he dealt with one J. F. Smith; that he had sought to get into communication with the defendant at Kansas City, Mo., by mail; that he had informed certain relatives of the plaintiff of the transfer of the goods to the Acme Storage Company; that he had mailed three letters to plaintiff and had received no reply thereto; that the Acme Storage Company sold the goods "after proper notice" on September 15, 1915, at public sale; that it had a lien upon them for a total sum of \$23; that the total marketable value of the property was not over \$100.

The plaintiff denied expressly any authority on the part of Smith or other persons to accept any notices on her behalf; she insists that Smith had merely interested himself in the matter as a friend and that the defendant had violated his contract by delivering the goods to the Acme Storage Company without notice to or authority from her.

The judgment of the trial court was in favor of the plaintiff for the sum of \$275 and the defendant appeals to this court.

Whether the defendant had taken proper steps to notify the plaintiff of the transfer of the property to the Acme Storage Company, and whether that company or the defendant had in good faith attempted to notify the plaintiff of an intention to sell the chattels, were questions which, under the circumstances of the case, could be better determined by the trial Judge.

Witnesses contradict each other in certain im-

Whether the defendant had taken proper steps to be notified the plaintiff of the transfer of the property to the defendant company, and whether the plaintiff or the defendant had in good faith attempted to notify the plaintiff of the transfer to sell the chattels, are questions which, under the circumstances of the case, could be better determined by the jury.

portant particulars. Witnesses who paid the storage charges to defendant directly contradict his testimony wherein he stated that he had informed them of the removal of the goods to the "Acme Storage House" or that he had notified them of the sale of the goods. It is apparent that the defendant did receive a communication from plaintiff, which he answered by a letter of October 26, 1915. While he says he attempted by other letters to notify plaintiff of the disposition of the goods, whether he did so or not was a question for the trial court. The plaintiff testified that she did not receive these communications.

The evidence introduced showed that the defendant did business as W. B. Lyles & Son. It was not error to amend the pleadings in the suit which was originally begun against W. B. Lyles & Son so as to make the defendant individually a party defendant.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

(Over.)

Witnesses who said the goods were
delivered to the plaintiff's warehouse as stated
that it was the plaintiff's duty to remove the goods to the
plaintiff's warehouse at that he had notified them of the sale
of the goods. It is apparent that the defendant did not
remove the goods from the plaintiff's warehouse until after the
sale of the goods. While he says he attempted to remove the
goods in early January of the disposition of the goods.
The plaintiff testified that he did not receive these goods
until after the sale.

The defendant's testimony shows that the defendant
did not receive the goods until after the sale. It was not until
the plaintiff in the suit which was originally begun against
the defendant that he made the defendant inadvisable a
party defendant.

The judgment of the Municipal court will be af-

firm.

(over.)

MR. JUSTICE McSWEENEY DISSENTS. As bailee for hire, the defendant W. B. Ilyes was obligated for only ordinary care, and in my opinion such care was exercised when the defendant, needing the space in his store occupied by the goods, and failing in his attempts to secure instructions from plaintiff as to their disposition, placed them in a licensed warehouse, and so advised plaintiff by mail sent to her last known address, and also informed the party in Chicago who had acted for plaintiff in the first instance.

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SEP 2 1912

THE SECRETARY OF THE
TREASURY
WASHINGTON
D. C.
SIR:
I have the honor to acknowledge the receipt of your letter of the 28th inst. in relation to the proposed issue of National Bank Notes for the purpose of providing a medium of exchange for the redemption of the National Bank Notes which are now being issued by the National Bank of the United States. I am sorry to hear that the National Bank of the United States is having difficulty in obtaining the necessary amount of funds to redeem the National Bank Notes which are now being issued by the National Bank of the United States. I am sure that the National Bank of the United States will be able to obtain the necessary amount of funds to redeem the National Bank Notes which are now being issued by the National Bank of the United States. I am sure that the National Bank of the United States will be able to obtain the necessary amount of funds to redeem the National Bank Notes which are now being issued by the National Bank of the United States.

Yours very truly,
J. P. Morgan

422 - 24775

ARTHUR KRUGGEL, doing business
as ARTHUR KRUGGEL & COMPANY,
Appellee,

vs.

ELLEN HANCOCK,

Appellant.

2131 673

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal
court in favor of plaintiff for the sum of \$354.00.

In a statement of claim filed by plaintiff it is
alleged that the defendant, Ellen Hancock, was indebted to
plaintiff "for work, labor and services rendered in negotiating
the sale of properties at No. 1841 Kenilworth avenue and No. 4029
North Springfield avenue, under written agreement and promise as
follows:

"I agree to pay to Arthur Kruggel and Company
three hundred and twenty-five dollars for their services
rendered for the sale of my properties known as #1841
Kenilworth avenue and #4029 N. Springfield avenue.
Ellen Hancock."

| | |
|---|----------|
| contract for the sale of which was
duly executed on the 19th day of
February, 1918..... | \$325.00 |
| Cash paid Chicago Title & Trust
Company at the special instance
and request of said Ellen Hancock
for continuation of abstract of
Lot 11 and the North Half of Lot
12, in Block 31, in W. B. Walker's
Addition..... | 19.50 |
| Cash paid Chicago Title & Trust
Company for Guarantee Policy. | 9.50 |
| | 29.00 |

Total.....\$354.00.

Ela, Grover & March,
Attorney for Plaintiff,
140 N. Dearborn St."

In an amended affidavit of merits the defendant al-

2131 673

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THIS IS AN AFFIDAVIT OF THE UNDERTAKING
MADE BY THE UNDERTAKER FOR THE SUM OF \$250.00.
IN A STATEMENT OF CLAIM BY PROSECUTOR IS TO

MADE BY THE UNDERTAKER, NILES HANCOCK, AND INJURED TO
PROPERTY FOR WORK, LABOR AND SERVICES RENDERED IN REPAIRING
THE SAME AT PROSECUTOR NO. 20, 1801 NORTH AVENUE AND NO. 1000
WEST CHICAGO AVENUE, UNDER VARIOUS AGREEMENTS AND TERMS AS

MADE BY THE UNDERTAKER, NILES HANCOCK, AND COMPANY
FOR THE UNDERTAKING OF THE UNDERTAKER FOR THE SUM OF \$250.00.
IN A STATEMENT OF CLAIM BY PROSECUTOR NO. 20, 1801 NORTH AVENUE,
WEST CHICAGO AVENUE AND 1000 WEST CHICAGO AVENUE,
NILES HANCOCK."

MADE BY THE UNDERTAKER, NILES HANCOCK, AND COMPANY
FOR THE UNDERTAKING OF THE UNDERTAKER FOR THE SUM OF \$250.00.
IN A STATEMENT OF CLAIM BY PROSECUTOR NO. 20, 1801 NORTH AVENUE,
WEST CHICAGO AVENUE AND 1000 WEST CHICAGO AVENUE,
NILES HANCOCK."

Total.....\$250.00

Wm. C. CROOK & SON,
ATTORNEYS FOR UNDERTAKER,
100 N. WASHINGTON ST.

IN NO MANNER WILLING TO BE BOUND BY THE UNDERTAKER

leged that she had a good defense to the suit upon the merits to the whole of plaintiff's demand; that the consideration for the written agreement set out in the statement of claim was services to be rendered by plaintiff in procuring the exchange of the properties of defendant and one Milton J. Patterson; that the defendant and Patterson, through the agency of plaintiff, had agreed in writing to an exchange of certain parcels of real estate and that the written agreement above set out, and which forms the basis of plaintiff's claim, was delivered to plaintiff by defendant for services which were to be rendered by the plaintiff in procuring the exchange of the properties.

It is further alleged in the affidavit of merits that the defendant, in pursuance of the written contract for the exchange of the properties, turned over to the plaintiff an abstract of title and a guaranty policy to her properties with instructions to deliver them to Patterson for examination; that the plaintiff failed to so deliver the abstract of title and the guaranty policy to Patterson, who, by reason thereof "was not able to and has not examined into the title of the property set out in said contract as owned by this defendant, and has not been able to approve the title to the properties of this defendant."

It is also alleged in the affidavit of merits that the plaintiff had agreed with defendant, at the time the instrument sued on was executed, that he was to receive no compensation for his services unless the said plaintiff procured the exchange of the properties of defendant and Patterson; that at the time this instrument was executed no services had been rendered by plaintiff to the defendant. The contract for the sale or exchange of the properties is not set out in the affidavit of merits or in the statement of claim and appears no place in the record.

The amended affidavit of merits was on motion stricken from the files. A default of the defendant was entered in the cause for want of an affidavit of merits and judgment was entered in favor of the plaintiff.

We think the court erred in striking the affidavit of merits from the files. While the defendant attempts to set up in the affidavit certain defenses which are of doubtful validity, we are of opinion that she should have been permitted to show under her affidavit that the plaintiff had failed to procure a person who was ready, willing and able to perform his part of the contract for the exchange of the properties.

Whether the instrument sued on may be regarded as a promissory note or a mere memorandum of an agreement of the parties may not be regarded as important in determining the right of the defendant to set up the defense that the plaintiff had wholly failed to perform the services in return for which defendant had signed the written agreement.

The statement of claim alleged that the defendant is indebted to the plaintiff for work, labor and services rendered in negotiating a sale of the properties. Notwithstanding that the written agreement on its face purports to be a promise to pay for services rendered, the defendant had the legal right to show that the services in fact had not been rendered at the time the instrument was executed and that the parties had by parol agreement entered into an agreement for the payment of the amount claimed to be due under the written agreement only in the event that the plaintiff, by his efforts, procured an actual transfer of the properties. Even if it be conceded that the instrument sued upon is a promissory note, this fact does not preclude the defendant from setting up the defense that no consideration existed for the note at the time it was executed, or that such

The mentioned affidavit of merits was an original document
from the files. A duplicate of the document was enclosed in the case
for want of an affidavit of merits and judgment was entered in
favor of the plaintiff.
We think the court erred in setting aside the affidavit
of merits from the files. While the defendant attempted to set
aside the affidavit certain defenses which are of doubtful
validity, we are of opinion that she should have been permitted
to show that her affidavit that the plaintiff had failed to
perform a person was ready, willing and able to perform his
part of the contract for the exchange of the properties.
Whether the instrument used on may be regarded as a
contract note or a mere memorandum of an agreement of the
parties may not be regarded as important in determining the rights
of the defendant to set up the defense that the plaintiff had
failed to perform the services in return for which she
testament had signed the written agreement.
The statement of facts alleged that the defendant
is indebted to the plaintiff for work, labor and services rendered
and is negotiating a sale of the properties, notwithstanding
that the written agreement on its face purports to be a promise
to pay for services rendered, the defendant had the legal right
to show that the services in fact had not been rendered or that
the instrument was executed and that the parties had by joint
action entered into an agreement for the payment of the amount
claimed to be due under the written agreement only in the event
that the plaintiff, by his efforts, procured an actual transfer
of the properties. Even if it be conceded that the instrument
now upon is a promissory note, such fact does not preclude the
defendant from setting up the defense that no consideration was
given for the note at the time it was executed, or that such

consideration had wholly failed. Schultz v. Meyers, 181 Ill. App. 335. But whatever may be said as to this matter, we are inclined to the view that the instrument in question can not be held to be a promissory note; that it is a mere memorandum in writing of the agreement of defendant to pay the sum named therein, and that it was competent for her to show by parol that nothing of value had passed to her from plaintiff at the time she executed the instrument; that it was given for services to be rendered and that it was allowable for her to prove that such services had not in fact been rendered at the time suit was brought.

It is alleged in substance by the defendant that the deal for the exchange of the properties failed because of the fact that the plaintiff, in violation of defendant's express instructions, had failed to deliver an abstract of title and a guaranty policy to Patterson, and that as a consequence he, Patterson, was unable to and had not passed upon defendant's title to the properties to be conveyed to Patterson. If this allegation be true it would seem to follow, as a matter of course, that the agent of plaintiff had by his own conduct prevented a consummation of the deal.

It is our opinion also that the allegation in the affidavit of merits that the plaintiff had agreed, as a consideration for the payment of the sum mentioned in the instrument set up in the statement of claim, that the plaintiff was to procure the exchange of the properties before he was to be entitled to his commission, sets up a good defense to the claim of the plaintiff; this allegation, when read in connection with the allegation that the plaintiff had, by his conduct, prevented an exchange of the properties by his failure to deliver the abstract of title and the guaranty policy, was sufficient. If it be true that the

plaintiff had agreed, as stated, to procure an actual transfer of the property before he was to be entitled to his commission, it would follow that it would be incumbent on him to prove that he had in fact procured the actual exchange of the properties before he would be entitled to a judgment in his favor.

It is attempted to set up as a defense to plaintiff's action that plaintiff was not a duly licensed real estate broker; that at the time the agreement was signed by defendant, plaintiff was engaged in business as a real estate broker, and that he was continually acting as such in the buying, selling and exchanging of real estate and that "this defendant is informed and so believes, and states the fact to be, that the said plaintiff is not a licensed real estate broker and therefore is not entitled to a commission," etc. This allegation also sets up a good defense to the action brought by plaintiff. Eckert v. Callot, 46 Ill. App. 361. The plaintiff was not, under the decided cases, permitted to act as a real estate broker unless he first procured a license to so act. Where one assumes to act or do business under the authority of a license the burden of proving such license authority rests upon him when challenged.

The defendant alleged in her affidavit that the plaintiff had without her knowledge acted in the matter as the agent of Patterson and had attempted to "charge a double brokerage fee from this defendant and also from said Milton J. Patterson without the knowledge of this defendant." This allegation set up a sufficient defense to the action.

In Young v. Trainor, 158 Ill. 428, the Supreme court held, in a case involving an exchange of properties, that the testimony showed that the plaintiff had acted as agent for both parties to a proposed transfer and that the plaintiff had "made no attempt to rebut the presumption of unfair dealing necessarily

arising from this double agency, by showing that appellee knew he was acting as Winter's agent, and had given his consent that he should so act."

In Dunn v. Reach, 214 Ill. 259, it was held that where an agent acts for both parties in a contract requiring the exercise of discretion, the "double agency" is available as a defense in an action on the contract.

As stated, the action brought by plaintiff is not upon a promissory note, but is, as appears in the statement of claim, an action for work, labor and services rendered in negotiating the sale of the properties in question; it is essentially a suit for real estate commissions; certain of the defenses set up in the affidavit of merits were sufficient, and the defendant should have been permitted to prove them, if she could.

The judgment of the trial court will be reversed and the cause remanded with directions to vacate the order striking the affidavit of merits from the files.

REVERSED AND REMANDED.

CHARLES COHN and HARRY COHN,
copartners doing business as
CHARLES COHN & BRO..

Appellants.

vs.

J. H. TAFT.

Appellee.

2131.A. 674

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from a judgment of the Municipal court of Chicago in favor of the defendant. Plaintiffs' action is predicated upon an alleged agreement of defendant to pay for certain goods which it is admitted were purchased by Thaddeus W. Taft from the plaintiffs.

September 18, 1917, defendant's brother, Thaddeus W. Taft, placed a number of orders through S. L. Rubel & Co. for merchandise to be shipped to him at Galesburg, Illinois, where he was about to open a retail business. On the day following the placing of these orders the defendant, J. H. Taft, called at the office of S. L. Rubel, who endorsed in handwriting upon the face of the order on which this suit is based the following:

"Just bought Dept. from Swanson.
J. H. Taft (Mason City) guarantees account.
They are O. K., please ship, Rush -"

It is urged on behalf of the defendant that the writing endorsed on the written order was not signed by the defendant and that under the Statute of Frauds he is not bound thereby; that Rubel was not defendant's agent and that his, Rubel's, act in writing the endorsement in question was not ratified by defendant.

There is a direct contradiction between the testimony

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of defendant and witnesses for the plaintiffs as to what occurred at the time the endorsement was made upon the order. The defendant testified that he never saw the writing on the order and that he did not know that it had been placed thereon; that he had never conversed with Rubel concerning the endorsement and that he had not been asked to guarantee payment for the goods ordered.

The evidence introduced on behalf of the plaintiffs is not in all respects satisfactory. At one point in his testimony Rubel stated, "I think J. H. Taft was present when I wrote this memorandum on there."

The evidence does show that the defendant had purchased certain fixtures for his brother. This fact does not, however, in and of itself render the defendant liable for the contract which his brother had made with the plaintiffs. The defendant testified that he called upon S. L. Rubel for the express purpose of notifying him that defendant's brother would be unable to pay for the large quantity of goods which he had ordered from plaintiffs and other dealers represented by Rubel.

The trial court had an opportunity to see and hear the witnesses who testified, and if the testimony of defendant be true, the court was compelled to enter, as it did, a judgment in his favor. His testimony in effect is that he neither expressly nor impliedly authorized Rubel to make the endorsement on the order. The writing itself does not even purport to have been signed by defendant.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

For the purpose of this report, the following information was obtained from the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and from the records of the various States and Territories.

516 - 24879

FRANK E. DAVIDSON,
Appellee,

vs.

CHARLES KLING and KLING
BROTHERS ENGINEERING WORKS,
a corporation,
Appellants.

213 I.A. 674

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago to recover for alleged services as architect for the defendants Charles Kling and Kling Brothers Engineering Works.

Both defendants denied employing the plaintiff as an architect or that he had rendered any services for them as alleged in the statement of claim. The judgment of the trial court was in favor of the plaintiff for the sum of \$5,250 and the defendants by this appeal seek to reverse this judgment.

Plaintiff testified on the trial that early in April, 1912, the defendant, Charles Kling, who was the then President of the defendant corporation, stated to him that he, Kling, had been trying for some years to finance a project for building a new manufacturing plant for the business conducted by Kling Brothers Engineering Works, and that if the plaintiff would help him to negotiate a loan and would make the plans and get estimates for a new building he would pay plaintiff for his work "whenever the building is financed or proceeded with;" that two or three days later Kling ~~again~~ called on plaintiff and that the plaintiff informed him that "there was no use of going to the expense on our part of preparing working plans until there was some reasonable chance of financing the deal;" that plaintiff

then informed Kling that "we would prepare the working plans and the specifications and secure proposals sufficient to estimate the cost of the building; that we would do what we could to assist him in financing it, and that whenever the building could be financed, or that he was proceeding with the work, that we should be paid for these plans and specifications, and that we would not expect payment on account until the work was proceeded with or financed."

Plaintiff also testified that he mailed a letter to Kling on April 22, 1912, confirming the verbal propositions made in plaintiff's office.

The evidence shows that in April, 1912, the land, on a part of which the proposed building was to be erected, consisted of 15 acres and was owned by the defendant, Charles Kling, and the plaintiff testified that Kling assumed to make the arrangements referred to on behalf of himself as well as the defendant corporation of which Kling was president; that Kling said to plaintiff "the property is in my name. The building will be for my company," and that the plaintiff and Kling agreed that whatever work was done by plaintiff was done for both defendants.

The evidence further shows that in the year 1909 the defendant Kling had made an application to one Gottschalk for a loan to enable Kling to construct a building on a part of his land; that plans for this building had been prepared by Grossman & Proskauer, architects; that Gottschalk directed Kling to deliver copies of his plans to the plaintiff who would make copies thereof and advise him, Gottschalk, with reference to the loan. Kling delivered the plans, as directed, to Davidson, the plaintiff, who recommended some changes therein. Gottschalk a short time thereafter offered, through the plaintiff, to make the loan requested by Kling, but on terms which Kling

[illegible]

refused. On the witness stand on cross-examination the plaintiff said that he did not recollect the Gottschalk deal, although later he testified that he had an indistinct recollection of a deal with a man named Gottschalk.

About April 1, 1916, plaintiff called upon Kling and informed him that the Pyle National Company was looking for a site for a manufacturing plant; Kling referred plaintiff to J. W. McKinney, a real estate broker, who was authorized to represent Kling. Thereafter negotiations were conducted between Vilas, President of the Pyle National Company and McKinney, as the result of which a building was erected on a part of the land owned by plaintiff which was leased from him by the Pyle National Company. The plaintiff was the architect for this building and it is clear from the text of a long letter, dated July 5, 1916, signed by him and delivered to the defendant, Kling, that plaintiff attempted to collect the amount due for his services in the construction of this building from Kling; the sum claimed to be due for these services, \$5250.00, was subsequently paid to plaintiff by the Pyle National Company; a part of this letter is as follows:

"For your information, I beg to advise you that Architects' services in connection with buildings are always considered as a part of the building cost and that I wish to call your attention to the fact that you knew all the time that I was preparing the working drawings for the building to be constructed on your property. In accordance with the contract entered into between you and the Pyle National Co. and in view of the fact that you knew that I was doing this work, it seems rather inconsistent at this time to advise me that I must look elsewhere for my pay."

Attached to this letter was the following bill for services:

"Kling Brothers Engineering Works,
To Davidson & Weiss, Dr.

To professional services in preparing working plans and specifications for Manufacturing Plant - 3 1/2% of estimate cost
\$150,000\$5250.00"

The plaintiff also testified that in the year 1916, he discovered that the defendant, Charles Kling, or the defendant corporation, had erected a manufacturing plant on a part of Kling's land which had not been leased to the Pyle National Company, and it is insisted on behalf of plaintiff that this building was erected from the plans made by the plaintiff in 1912 and that under the arrangements with Kling, he, as well as the defendant corporation, should be required to pay therefor the exact sum, \$5,250.00, which was paid by the Pyle National Company for the services rendered by plaintiff to it as above indicated.

Kling testified that he had had no dealings whatsoever with the plaintiff, except those concerning the proposed Gottschalk loan and the arrangements made through his agent, McKinney, for the erection of the Pyle National Company's building; that the plaintiff had never sent him a bill for the work which plaintiff alleged was performed in 1912, and that he, plaintiff, never demanded by letter or otherwise payment for these alleged services; that the first time he, Kling, knew of plaintiff's claim was when plaintiff "put a lien on the property without writing any letter or sending any bill." Kling also testified that the building for the defendant company's use was built in substantial compliance with the plans which had been prepared by Grossman & Froesauer, which had been revised by Norman Jensen, an architect; that he did not use the plans prepared by Davidson; that he had no authority from the Board of Directors of the defendant corporation to enter into a contract with plaintiff for the erection of the building. He denied receiving the letter of April 22, 1912.

It was incumbent upon the plaintiff to prove the material allegations made in the statement of claim by a preponderance of the evidence, and in this we think he failed.

His claim is based directly upon his testimony concerning the conversations which he testified he had with the defendant in April, 1912. The defendant Kling directly denies that he made any such statements or declarations as are attributed to him by the plaintiff. It is true that plaintiff says that following these conversations and in confirmation thereof he mailed a letter to the defendant Kling, who denies that he ever received such letter. No charges were made on the books of the plaintiff against either defendant, although plaintiff, in testifying six years after the date of the letter, says that he mailed it personally for the reason that "I wanted to be in a position later to swear that I mailed it. * * * In spite of the fact that I considered this proposition a gamble I thought it necessary to mail this particular letter personally."

It is our opinion that the case should be sent back to the trial court for a new trial and for this reason we do not wish to express more than is advisable with reference to the weight of the evidence introduced on the trial. It may be said, however, at this time, that the evidence before us does not preponderate in favor of the plaintiff. The defendant Kling directly denies having made the contract sued upon with the plaintiff, and the testimony of other witnesses and the facts shown upon the trial when carefully analyzed tend to corroborate the defendant's theory of the case.

As late as the year 1916 the plaintiff attempted to compel Kling to pay him the exact sum which he now claims is due him on another account for services rendered by plaintiff in the erection of the Fyle National Company building. He did not aid in the building or financing of the Kling building and Kling testified that his only work in connection therewith was an unauthorized attempt, for the purpose of consummating the Gottschalk

The first of these is the fact that the defendant is a person of good character and high standing in the community. He is a man of good family, well educated, and of high social position. He is a man of good character and high standing in the community. He is a man of good family, well educated, and of high social position. He is a man of good character and high standing in the community. He is a man of good family, well educated, and of high social position.

loan , to change the plans for the building made by the architects, Grossman & Proskauer.

We think the evidence also preponderates in favor of the defendant's claim that the Kling building was built in compliance with the plans prepared by Grossman & Proskauer as modified by Jensen.

The evidence introduced on the trial fails to make out a case against the defendant, Kling Brothers Engineering Works. This defendant is a corporation and the defendant Charles Kling was its President; as such he had no implied power, and the evidence fails to show that he had any express authority, to legally bind the corporation to pay for the services which plaintiff alleges were rendered by him.

In Cogens & Beaton Trustee v. Western R. & I. Co., 112 Ill. App. 311, the court in referring to the powers of a president of a corporation, said:

"He may make such ordinary contracts as are required in the every-day business of the company, such as arising in the routine of business may be imposed by custom or necessity, without special or express authority. Green vs. Blodgett, 49 Ill. 10, 186, and cases there cited. Idem; 55 Ill. App. 556, 562.

Wait v. Nashua, 14 L. R. A. 361; Nathias v. White, 19 Mont. 359; Cook on Corporations, Vol. 3, page 2488 (7th edition); Elliott on Private Corporations, page 719.

If plaintiff's testimony concerning the conversations had with Kling in 1912 be accepted as true, it follows that Kling attempted to bind the corporation in a matter in which he, himself, had a personal interest. Under such circumstances, the corporation would not be legally bound by his acts. Silman, Clinton & Springfield Ry. Co. v. Kelly, 77 Ill., 426; Klien v. Independent Brewing Assn., 231 Ill., 594.

The judgment against Kling brothers Engineering Works is erroneous. Powell v. Fian, 198 Ill. 567

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It is insisted that the statement of claim is to state a cause of action. However, in an affidavit of merits filed by the defendants the insufficiencies of the statement were supplied by a direct presentation of the issue as to whether defendants had agreed to pay plaintiff the sum of money claimed to be due him. Lyon v. Kantor, 385 Ill. 336. Other alleged errors may not arise upon another trial of the cause and need not be discussed here.

The judgment will be reversed and the cause remanded to the trial court for a new trial.

REVERSED AND REMANDED.

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164 - 24511

JAMES CAMPBELL,
Appellee,

vs.

KENWOOD TRUST & SAVINGS
BANK, a corporation,
Appellant.

213 I.A. 674

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLBOM DELIVERED THE OPINION OF THE COURT.

Plaintiff bought of the defendant bank a \$500 10-25 year 4% gold bond of the U. S. A. and paid the bank for the bond. On this point there is no dispute between the parties. Plaintiff now contends that the bank failed to deliver to him the bond, but took his receipt therefor. On a trial before the court without a jury there was a finding and judgment for the plaintiff, and defendant appeals.

It appears that plaintiff was a customer of the defendant bank and had many transactions with it and among others had bought through it different kinds of bonds. On October 24, 1917, plaintiff, by writing signed by himself and directed to the Secretary of the Treasury, applied to defendant for the \$500 bond in dispute. At the time he made application for the bond he gave the bank a check for the amount thereof, \$500, but on the same day took the check back, destroyed it, and gave another for \$10. The balance of \$490 he paid on November 14, 1917. This transaction was had with a Mr. Staehling, an assistant cashier of the bank.

Plaintiff wanted one \$500 bond and it appears that he went into the bank several times inquiring for such a bond, but that he could not get it because the bank did not have one of the \$500 denomination on any of the occasions when he called for it.

Plaintiff on cross-examination was asked the follow-

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ing question: "Then since you were not going to get the bond immediately you said to Mr. Staehling that there was no reason why the bank should have the interest on that \$500 and then Mr. Staehling told you you could do what you have just now said you did do, namely, pay 2 per cent, ten dollars, and the balance later. Then you lifted that check, that \$500 check was not run through?" To which he answered: "Such a conversation as that you speak of today, now, was never uttered by Staehling to me. This is the first time; there is no such thing to it." He was then asked: "You do not recall now writing that check for \$500?" to which he answered, "No, sir; never did. It would be on my stub now." After retiring from the witness stand plaintiff was recalled to testify by his counsel, and then stated that since the last hearing he had examined his stub books for October 24, 1917; that therefrom his recollection was refreshed and he then admitted that he did make out a check for \$500 on that date, and on cross-examination testified that he originally made the check for \$500 and then destroyed that check and gave one for \$10, which accounted for the erasure of the \$500 to the right of the \$10 in the application. Plaintiff said he intended to pay for the bond in one payment, but Mr. Staehling told him that there was no necessity of paying more than \$10, that he was to pay the balance the next month, and so he adopted that method.

These facts are recited to show that plaintiff was honestly mistaken in this regard and voluntarily made the correction in his testimony.

Defendant insists that plaintiff was given five \$100 bonds in fulfilment of his application and that his receipt therefor was taken. Upon the application plaintiff's signature appears in two places and he contends that he placed them both

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there on October 24, 1917. One signature is written at the bottom on a line containing the words, "Bank's partial payment." Defendant contends that signature was placed there at the time the five \$100 bonds were delivered to plaintiff in fulfillment of his order, under a red ink rubber stamp - "Received the above described bonds." We find on the original application an arrow indicating that the signature was intended to be upon the line below the words last quoted.

It is patent that plaintiff's name served no useful purpose upon the line where it was written and that, as contended by defendant, the name of plaintiff in that place was intended as signature to the receipt above it; such contention seems logical in view of all the facts, and particularly as it was shown that receipts on applications in numerous other cases were not signed upon the line but indiscriminately - away from the line, below the line, and in some cases even above the words of the receipt.

When plaintiff swears that he put his name on the bottom line under the rubber stamp receipt at the time he signed the application October 24, 1917, he is simply mistaken. This is a case where plaintiff cannot escape from the elementary rule that he must maintain his action by a preponderance of the evidence.

On the decisive points in dispute plaintiff's own testimony is unsupported. The contentions of the defendant bank are sustained by the testimony of four veracious witnesses, none of whom is more interested in the ultimate decision of the case than is plaintiff. The documentary evidence likewise supports defendant's defense, and the receipt for the bonds upon the face of the application is, we think, conclusive of the fact that plaintiff got his bonds.

There is no question regarding the veracity of any of the witnesses who testified; all evidently testified to what they honestly believed to be the facts. The dispute resolves itself into a question of whether plaintiff has made out his case by a preponderance of the evidence, and we hold that he has not. We cannot escape from the conclusion that plaintiff's evidence was not only entirely overcome by documentary evidence and the testimony of four witnesses for defendant, but that defendant's defense was clearly and completely established thereby.

For the foregoing reasons the judgment of the Municipal court is reversed and a judgment of nil capiat and for costs entered in this court.

REVERSED WITH JUDGMENT OF
NIL CAPIAT AND FOR COSTS.

JENNIE COHEN,
Appellant,
vs.
HARRY YABLONSKI,
Appellee.

213 I.A. 674

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. The cause was tried before court and jury and there was a verdict and judgment for defendant.

The plaintiff claimed to have sold defendant a pair of diamond earrings for which there was due \$213.50. Defendant denied that he bought the earrings from plaintiff or that he was indebted to her on any account.

The testimony of the witnesses on the part of plaintiff and defendant is in irreconcilable conflict. There is testimony which, if given credence by the jury, would support plaintiff's claim or defendant's defense.

We have scrutinized the testimony. To recapitulate it would serve no useful purpose, and we therefore refrain from so doing. We cannot say that the verdict is not supported by the evidence or that it is clearly against the weight of the evidence. The court and the jury may have viewed the testimony of the various witnesses, as does the writer of this opinion, with grave suspicion. The evidence of several of the witnesses is manifestly unreliable.

The court and jury saw the witnesses and observed their demeanor upon the witness stand and were therefrom better able than are we to determine where credit should be given. Although we might think from an examination of the evidence that there was some merit in plaintiff's claim, yet in view of the

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CHICAGO, ILL.,

SEPTEMBER 1, 1900

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contradictions in the proofs we do not feel that we should disturb the judgment, as we are not able to say that it is clearly against the preponderance of the evidence. In other words, this is a case where the verdict of the jury and the judgment of the court involving, as they do, simply the credibility of the several witnesses, should not be disturbed upon review, where the reviewing court has not the opportunity of seeing the witnesses.

We cannot say that the evidence in the record establishes the claim of plaintiff by its preponderance. The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

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227 - 24577

REMY MARSANO,
Appellee.

vs.

M. A. BERGMAN,
Appellant.

213 I.A. 674

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

Plaintiff in attempting to cross Clark street near Menomonee street in Chicago was struck by an automobile said to belong to defendant and injured, and for the injuries so suffered and in compensation therefor the suit was brought. There was a trial before court and jury, a verdict for \$4600 and judgment thereon, and defendant appeals.

In the conclusion at which we have arrived in this case there must be another trial and we therefore refrain from discussing or giving any opinion upon the probative force of the evidence or as to the measure of damages.

The judgment must be reversed for the error of the court in giving to the jury the following instruction:

"The court instructs the jury that if you believe from the evidence that the plaintiff, Remy Marsano, was injured by the automobile of the defendant, and that such injury was the result of the negligence of the defendant, or of the servant of defendant, then the jury will find the issues for the plaintiff."

It is elementary that to entitle a plaintiff to recover in an action of this character, such plaintiff must prove that he was in the exercise of ordinary care for his own safety; and if not in the exercise of such ordinary care at the time the injury was suffered, regardless of all other questions, including the negligence of the defendant, there can be no recovery.

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The element of due care upon the part of plaintiff is absent from the instruction. The instruction directs a verdict for plaintiff because there is no controversy over the fact that plaintiff was injured by the automobile of defendant. Plaintiff is not entitled to recover unless he was so injured not only through the negligence of defendant charged in the declaration or some count thereof, but plaintiff must have been at the time in the exercise of due care for his own safety. Krieger v. A. E. & C. B. B. Co., 242 Ill. 544; Cramer v. Borders Coal Co., 246 *ibid* 451.

Defendant complains also of the action of the court in denying his motion made upon the trial to file a plea in abatement on the ground that plaintiff was an Austrian and an alien enemy. The reason given by the court for denying the motion was that it came too late after the filing of the plea of the general issue. We think the court erred in this regard. There are three complete reasons for holding that the court erred in denying the motion. The first is, that at the time of the filing of the plea of the general issue this country was not at war with Austria; the second is, that there are no averments in the pleading of plaintiff disclosing his alien enemy status; and third, such alien enemy status was disclosed for the first time on cross-examination of the plaintiff upon the trial. We therefore hold that in the circumstances disclosed, the general rule that a dilatory plea, which a plea of abatement is, must be first filed and that pleading to the merits waives the right to file such dilatory plea, should be departed from to meet the condition disclosed by the record. If this country shall still be in a state of war with Austria and plaintiff shall still be an alien enemy when defendant renews his motion, he may have leave to set up the alien enemy status

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of plaintiff by an appropriate plea, although in all probability before this case can in the orderly conduct of the business of the Superior Court be again reached for trial, the belligerent attitude of this and the Austrian governments will have ceased and the status quo ante bellum restored.

This precise question has not been passed upon by our Supreme Court, although in Pienta v. Chicago City Ry. Co., 284 Ill. 346, the question was raised for the first time in the oral argument before the Supreme Court. This did not present the question for review, and the court said:

* * * "We only refer to it to show that it was raised in this court and the manner in which it was raised, so that the matter may be properly considered, if desired, in accordance with the facts, on the new trial of the case.

"The errors in the instructions which we have pointed out, in view of the record in this case are of such a serious nature that we cannot hold them harmless. We think, considered together, they must be held to be reversible error."

For the reasons indicated the judgment of the Superior Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

It is a fact that the Government is not responsible for the actions of the individual members of the business community. The Government is not responsible for the actions of the individual members of the business community. The Government is not responsible for the actions of the individual members of the business community.

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256 - 24607

MICHAEL CONSIGLIO,
Appellee,

vs.

EMILIO LONGHI and
FRANK ACOSTA,
Appellants.

213 I.A. 675

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This action is on a bond given in an appeal of a cause to this court in which there was the usual condition that if the obligors should prosecute the appeal with effect, the bond should be void, but failing so to do, the same should remain in full force and effect.

The suit in which the appeal bond was given was dismissed by this court, whereupon the defendant in the suit so dismissed sued out of this court a writ of error, bringing the same judgment involved in the appeal again before us for review. The writ of error case is still pending and undetermined, and defendants contended before the trial Judge that these facts constituted a good defense against the claim of plaintiff under the appeal bond in suit. The trial Judge, however, did not agree with these contentions of defendants, held that the facts so stated did not constitute a defense and gave judgment in debt for \$850, the penalty of the bond, with damages assessed at \$487.75, debt to be discharged upon payment of damages with costs. From this judgment defendants appeal.

We agree with the trial Judge that the defenses set out in defendants' affidavit of meritorious defense did not constitute a defense to the action upon the appeal bond. The trial was ex parte, defendants not appearing upon the trial, nor was any

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U.S. DEPT. OF JUSTICE

WASHINGTON, D.C. 20535

TELETYPE UNIT

TO DIRECTOR, FBI (100-388610)

FROM SAC, NEW YORK (100-100000)

SUBJECT: JAMES EARL RAY, AKA; MURKIN

RE NEW YORK TELETYPE TO BUREAU, NOVEMBER 18, 1964.

THIS CASE IS BEING HANDLED BY THE NEW YORK OFFICE.

IT IS REQUESTED THAT YOU ADVISE THE BUREAU OF ANY DEVELOPMENTS.

VERY TRULY YOURS,

W. J. MOHR

ENCLOSURE

100-100000-1000

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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defense made at the trial in their behalf. However, after the judgment they moved to vacate it, which motion the court denied; and as the facts set forth in the affidavit of meritorious defense did not, if true, constitute a defense, the ruling was without error.

We cannot take into account as a defense the pendency of a writ of error on the judgment in the appeal case. This action is upon a bond for condition broken. This fact appears without dispute. The liability of defendants is controlled by the conditions of the bond in suit, which is the contract of the parties. Hubbell Fertilizer Co. v. Jacobellis et al., 199 Ill. App. 379, disposes of the precise question here involved against defendants' contention.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

between the two sides of the trial is their ability to present evidence. The court has the duty to ensure that the trial is fair and that the evidence is presented in a way that is understandable to the jury. The court must also ensure that the evidence is presented in a way that is consistent with the law.

We cannot take into account the fact that the evidence is presented in a way that is understandable to the jury. The court must ensure that the evidence is presented in a way that is consistent with the law. The court must also ensure that the evidence is presented in a way that is understandable to the jury. The court must also ensure that the evidence is presented in a way that is consistent with the law.

The judgment of the majority is as follows:

WILSON AND COMPANY, a corporation,
Appellant,

vs.

EVERETT R. PEACOCK,
Appellee.

213 I.A. 675

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This is a contest between a landlord of the mortgagor and the mortgagor in a chattel mortgage on certain meat market fixtures. The action is replevin; defendant prevailed and plaintiff appeals.

The tenant of defendant, one Meyerdiercks, gave a chattel mortgage upon the replevined property to secure certain notes. This property was used by the mortgagor in the business of a meat market which he conducted in a store leased from defendant. The notes matured and were not paid, whereupon the mortgagor delivered the mortgaged property to plaintiff under the terms of the mortgage; plaintiff took possession and retained it until dispossessed by defendant through what amounted to a trick practiced by defendant upon plaintiff's agent. The mortgagor gave to plaintiff's agent the key to the store in which was the mortgaged property, being the only key there was to the store at that time, under an agreement that plaintiff should sell the property and from the proceeds pay the mortgage debt, rendering the overplus, if any, to the mortgagor. Plaintiff took physical possession of the mortgaged property until defendant requested the key to the store where the property was under the guise of showing it to a prospective purchaser. Defendant thereafter refused to return the key, claiming the mortgaged property under his lien as a landlord for rent due and

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unpaid from the mortgagor. Thereupon plaintiff brought this replevin suit and took the mortgaged property under the writ. Upon a trial before the court without a jury there was a finding that defendant was entitled to the possession of the property and a writ of retorno habenda was awarded.

The law does not encourage subterfuge, deceit or trickery, and thereon no rights can rest secure in the eye of the law. Defendant obtained possession of the mortgaged property by subterfuge and a representation which was false. He cannot advantage of such conduct. Defendant set up a false defense, claiming that Meyerdiercks, the mortgagee, surrendered the mortgaged property to him, while the evidence proved that possession was secured by borrowing the key of the store in which the property was kept on the pretense of exhibiting the property to a prospective purchaser.

The surrender of possession of the mortgaged property by the mortgagor after default in payment of the mortgage debt to the mortgagee was effective to vest the title to such property in the defendant mortgagee, which possession he could maintain successfully against all claimants under the mortgagor. Frankenthal v. Meyer, 55 Ill. App. 405.

Plaintiff could also maintain replevin for the property taken from him by a wrongdoer such as defendant was. Downey v. Arnold, 97 *ibid* 91.

Under the law and the evidence the trial Judge should have found for the plaintiff and given judgment in its favor for the goods replevined.

The judgment of the Municipal Court is reversed and the cause remanded for a new trial in conformity with the views herein expressed.

REVERSED AND REMANDED.

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311 - 24662

213 I.A. 675

JAMES W. GUSTAT,
Appellee.

vs.

DANIEL HAYES COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

In this case plaintiff had judgment on an ex parte hearing before court and jury for \$1046.32, and this appeal therefrom is prosecuted on the contention that in violation of Rule 12 of the Circuit court defendant's motion for continuance was denied.

It appears that on the call of the case for trial at the opening of court in the morning, an attorney speaking for the attorney of record for defendant asked for a continuance of the case for the alleged reason that the attorney of record was at his home suffering from a sore throat. This fact, if it was a fact, was communicated over the telephone to the attorney making the motion, as he stated, by the wife of the attorney of record. Of the verity of such statement the moving attorney had no knowledge. The attorney for plaintiff resisted the motion, saying that his client resided in Joliet and was present to try the case. It was then agreed by court and both counsel that the hearing of the case should go on at two o'clock. With this understanding counsel left the courtroom. At two o'clock counsel for plaintiff returned and after some delay the case was again called for trial. Thereupon an attorney not of record and who had not theretofore appeared in the cause spoke for defendant and represented to the court that the attorney of record was ill at his home with a sore throat and asked that the cause be continued. This attorney made his statements regarding the

claimed illness of defendant's attorney of record entirely from hearsay and not from his own knowledge. No affidavit or other proof was offered to support this motion for a continuance, although an offer was made to put the wife of the attorney of record upon the witness stand to prove the fact of her husband's illness. This the court refused to allow, and the trial proceeded, resulting in the judgment found in the record.

In order to reverse this judgment we must hold that in denying the motion for a continuance of the cause the trial Judge was guilty of an abuse of that discretion which the law reposes in the judiciary. This, in the condition of the record before us, we cannot do. There was no evidence before the trial Judge of any fact which would have justified the granting of a continuance.

Rule 12, invoked by defendant and which the trial Judge, it is contended, disregarded, is as follows:

"When the principal attorney or solicitor of record, or the attorney or solicitor specially charged with the trial of the case of a party, is ill or actually engaged in the trial of a cause in some other court at the time the cause is called for trial, and the other party is ready, the court will pass the cause for the time without prejudice, where it appears by affidavit or otherwise that the party seeking the delay has used due diligence to be ready for trial, and would have been ready but for the illness or engagement of his attorney."

An unanswerable reason for affirming the judgment is that defendant moved for a continuance and invoked Rule 12 to support the motion. Rule 12 regulates motions to pass cases, not to continue them, and has no application to a motion to continue.

Furthermore, defendant sought to set off unliquidated damages under a contract entirely disconnected with the contract upon which plaintiff declared. This the law does not permit.

Falkenan v. Benedley, 200 Ill. App. 6.

Defendant's set-off did not grow out of the contract

sued upon and it was not for liquidated damages; consequently it presented no triable issues as against plaintiff's claim.

Carllezek v. Rothenstein, 210 ibid 270.

There is no error in this record calling for a reversal of the judgment of the Circuit court, and it is therefore affirmed.

AFFIRMED.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

There is no error in this amount and it is correct.

342 - 24693

GEORGE J. BENT COMPANY,
a corporation.

Appellant.

vs.

RALPH M. OTT.

Appellee.

213 I.A. 675

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

In this case the defendant bought of plaintiff a victrola for \$200 on the instalment plan, paying \$20 on account. He signed a document in the nature of a promissory note with power to confess judgment thereon. A judgment was entered on this document for \$205.87. On motion the judgment was opened and defendant let in to defend, which he did, and made a counter-claim for \$20, the amount which he had paid down, on the contention that the victrola was defective; because of such defect he had rescinded the contract and demanded back the cash payment. A trial before court and jury resulted in a verdict and judgment in favor of defendant for the amount of his counter-claim, and plaintiff appeals.

The real issue in this case and upon which issue the case was tried, is: Was defendant entitled to a perfect machine and did he get such a machine?

As defendant bargained for a new machine he was entitled to a perfect one. This the law will imply. That the machine was defective is admitted. Plaintiff's own witness testified that "There is a crack in the sound board; it is a pin crack. It is on top of the board, not visible on the outside. To see it you have got to get down to it and look around and then look up. I tried the machine. The tone is no different to me with a crack in the tone board." The crack was five inches.

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TO THE CHIEF OF POLICE
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CHICAGO, ILL.

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CHICAGO, ILL.

RECEIVED FROM THE CHIEF OF POLICE

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A split would make a difference in the tone arm but not in the tone chamber.

This is proof positive that the victrola was defective. Under this evidence the jury could not find otherwise than they did. The fact that the defect did not affect the tone of the instrument is beside the question. Defendant was entitled to a perfect victrola. In these circumstances defendant had a right to rescind the contract, and as he exercised such right within a reasonable time and did nothing thereafter in affirmation of the contract, the rescission was effective. Hakes v. Aaron, 182 Ill. App. 100.

The jury might reasonably find that there was no use of the victrola by defendant after his rescission of the contract inconsistent with the ownership of plaintiff. The attitude of plaintiff was and still is that there can be no rescission, and acting thereon it refused to receive back the instrument, but left it in the possession of defendant against his will.

There is no question rightfully in this case involving a verbal contract in contradiction of the terms of the chattel mortgage given to secure the purchase price of the victrola, and we decide this question solely on the proposition that defendant impliedly bargained for a perfect victrola and indisputably received one that was defective.

There is no reversible error in the rulings of the trial court upon the evidence or the instructions; therefore the judgment of the Municipal court is affirmed.

AFFIRMED.

THE COURT SHALL HAVE THE MATTER IN THE HAND AND THE CASE

THE COURT SHALL HAVE THE MATTER IN THE HAND AND THE CASE

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THE COURT SHALL HAVE THE MATTER IN THE HAND AND THE CASE
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THE DEFENDANT IS DEAD THE QUESTION. DEFENDANT WAS CRIMINAL
ON A CRIMINAL VIOLATION. IN THESE CIRCUMSTANCES DEFENDANT HAD A
RIGHT TO A TRIAL BY JURY, AND HE WAS DENIED SUCH RIGHT
WHICH IS A VIOLATION OF HIS RIGHTS AND HIS RIGHT TO A TRIAL
BY JURY. THE PROSECUTION WAS DEFECTIVE. Page 7.

Page 7. THE COURT SHALL HAVE THE MATTER IN THE HAND AND THE CASE

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357 - 24709

JOHN E. FRICKSON, Administrator
of the Estate of CHARLES NELSON,
deceased,

Appellant,

vs.

MICHAEL REDDY,

Appellee.

213 I.A. 676

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

This is an action of replevin for four horses. On a trial before the court and jury the trial Judge, on motion of defendant made at the conclusion of plaintiff's case, instructed a verdict in favor of defendant, judgment thereon was entered and plaintiff prosecutes this appeal and asks a reversal.

The facts are few and simple. The horses in question belonged to the estate of Charles Nelson, deceased, of which the plaintiff, John E. Frickson, was administrator. Part of the assets of the estate consisted of a livery business conducted by the deceased in the premises where the horses in question were kept both before and after the death of deceased. Under an order of the Probate court in the estate of deceased, Frickson as administrator was authorized to sell the assets of the deceased's livery business, of which the four horses in question were a part. The sale was to be a public sale at auction to the highest bidder for cash. The terms of the order required the administrator to sell for cash. Defendant desired to purchase the four horses in question and plaintiff was willing to sell them to defendant at an agreed price, with the distinct understanding that the price agreed upon should be paid in cash. By one subterfuge and another defendant excused himself from paying the cash, promising every time the excuses were made to procure the neces-

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sary cash and pay it to plaintiff for the horses without delay. Finally, upon the pretext of having a claim against the estate of Nelson, defendant refused to pay the sum agreed for the horses and thereupon this replevin suit was commenced.

It cannot be said that by any act of plaintiff as shown by the evidence did plaintiff deliver the horses to defendant. The horses were kept by plaintiff in the same place as they were kept in the lifetime of deceased. While it is true that subsequently defendant obtained a lease to himself of the premises in which the horses were kept and there started a livery business of his own, yet by no act of plaintiff was there any delivery of the horses to defendant. They were allowed to remain where they always had been on the express agreement of defendant that he would pay the purchase price of the horses in cash. The payment of the purchase price in cash was clearly a condition precedent or at least concurrent to the passing of title to the horses. Failing to pay, no title passed.

The law upon this subject would seem to be elementary. Where a sale is made of personal property with a condition precedent or concurrent to the passing of the title, such title will not pass until the precedent or concurrent condition is fulfilled. Sec. 326, Benjamin on Sales.

While defendant accepted the offer of plaintiff, he failed to comply with the condition precedent contained in that offer, and therefore there was no sale. From the testimony in the record it is clear that it was the intention of the parties that the sale should be for cash. In fact, under the order of the Probate court authorizing the sale, plaintiff could not make any other terms, and as defendant was purchasing from the administrator of the Nelson estate under an order entered in the

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...to pay the same for the purpose of ...
...

It cannot be said that by any act of plaintiff as ...
...the parties were kept by plaintiff in the same place ...
...in the interest of defendant. ...
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The law upon this subject would seem to be elementary ...
...is made of personal property with a condition ...
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...as before.

While defendant accepted the offer of plaintiff, he ...
...with the condition precedent contained in that ...
...there was no sale. ...
...it is clear that it was the intention of the parties ...
...the sale should be for cash. ...
...the court authorizing the sale, plaintiff could not ...
...and as defendant was not ...
...of the sale was made under an order entered in the

Probate court in that estate, he was bound to take notice of the limited authority of plaintiff in making the sale. The contract was in its essence executory, and no title passed until the price agreed was paid. Windschuller v. Fleming, 129 Ill. App. 476; Gibson v. Chicago Packing & Provision Co., 108 *ibid* 100.

While the evidence shows there was no delivery, if there had been delivery without performance of the precedent or concurrent condition of payment, no title would pass. Gibson v. Chicago Packing & Provision Co., *supra*.

For the error of the trial Judge in directing a verdict at the conclusion of plaintiff's testimony for the defendant, the judgment of the Municipal court is reversed and the cause is remanded for a new trial in accord with the views herein expressed.

REVERSED AND REMANDED.

...in that estate, he was bound to take notice of the
...of plaintiff in making the sale. The evidence
...and no title passed until the price
...was paid. Wheeler v. Wheeler, 100 Ill. App. 400; Olson
... Wheeler v. Wheeler, 100 Ill. App. 400.

While the evidence shows there was no delivery, it
...had been delivery without performance of the conditions of
...condition of payment, no title would pass. Olson v.

Olson v. Wheeler, 100 Ill. App. 400.
...the error of the trial judge in dismissing a ver-
...of plaintiff's testimony for the defendant.
...the Municipal Court is reversed and the cause is
...a new trial in accord with the views herein expressed.
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375 - 24728

CHARLOTTE E. WULFF,
Appellee,

vs.

JULIUS SCHMIDT,
Appellant.

213 I.A. 676
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action against defendant by the plaintiff, a guest of defendant's tenant, for personal injuries resulting from the breaking down of a porch upon the premises of defendant, where plaintiff was sitting at the invitation of the tenant, her sister.

There have been two trials with resulting verdicts of \$1,000, upon the last of which judgment was entered and from which judgment defendant brings the record here by appeal for review and reversal.

Neither the amount of the judgment nor the injuries suffered by plaintiff is challenged, and it is not disputed but that the accident happened as averred in the declaration and proven by the evidence heard upon the trial. However, it is insisted that the declaration states no cause of action and that the motion of defendant for an instructed verdict in his favor should have been allowed and that there are errors in certain of the instructions given to the jury.

It appears that the porch which gave way upon the occasion of plaintiff's injuries was not a part of the premises leased to any of the tenants of the building, but was a part of defendant's premises used in common by his tenants, more particularly in reaching the attic, which was used in

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common by the tenants in drying their laundry. Defendant admits that the guest of the tenant has the same right of action against the defendant landlord that the tenant would have if injured in like circumstances. Park v. Lenn, 203 Ill. App. 188.

It is urged for defendant that the only question about which there was any dispute before the jury was as to how much there was of decay or weakness in the porch as seen after the floor of the same gave way.

It is true that there was no patent defect in the porch visible on a casual observance, but that the defect was latent and not discoverable in the exercise of ordinary care. However, after the accident it was abundantly proven that the ends of the cross-pieces where they were attached to the up-rights were decayed and the upright was "pulpy" and that the floor joists were still attached to the cross-pieces. It was also testified that the cross-piece was still attached to the upright and that the same was decayed where the floor joists set in, and it was proven that the nails or spikes in the floor joists were rusty.

It is true that the porch was subjected, upon the occasion in question, to a considerable strain. There were five women upon it, a hand washing machine, a wash bench, a chair and a rocker. These all together weighed about half a ton. It seems the tenant, the sister of plaintiff, was a large woman weighing about 225 pounds, and when she added her weight to that which was already upon the porch it gave way.

It is in evidence that it was not infrequent that tenants used the porch by sitting thereon and that the night of the accident was a hot July night and the women repaired to the porch because it was cooler there than in the house.

It was also proven that the premises were of wooden

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It is in evidence that it was not ...
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construction, originally built in 1892, and were two stories in height; that in 1902 the building was raised and a brick foundation put under it and also a third flat on the ground floor.

The jury from this evidence had a right to conclude that the part of the porch which gave way was defective, that the defect was latent and could not be ascertained by casual observation, that defendant was negligent in not maintaining the porch in an ordinarily safe condition, that he might have known by the exercise of due care and circumspection that the joists were liable to become, as they were, rotten and decayed after having been exposed to the weather for so many years, and that defendant could not avoid liability by merely denying that he had any knowledge of the rotten condition of the cross-pieces and uprights, which condition the evidence abundantly establishes. Defendant cannot shield himself because he had no knowledge of the condition. As said in Mattoon v. Werland, 97 Ill. App. 13:

"The fact that one of the boards broke under the weight of appellee proves it was unsound. Did appellant know it was unsound, or by the exercise of reasonable care or examination could it have known of the defective boards? * * * It is a matter of common observation that boards will rot on the underside when laid over an excavation in which dampness collects and remains without the freedom of air circulation. A mere casual inspection of the boards at that time would, we think, have disclosed the fact that the boards were thin and weak from decay beneath, while remaining apparently sound on the tops of them. Common prudence and care demanded at that time a better inspection than was given, and if appellant did not know the dangerous condition of the boards, it was the fault of its own chosen officer or servant, for whose negligence it is liable."

And so in the case at bar, defendant could have readily ascertained by casual inspection the rottenness which existed in the supports of the porch and that it must have been for some time in need of repair; and the jury might reasonably so find from the evidence.

It is the duty of a landlord to exercise ordinary and reasonable care in the maintenance of porches and stairways and

...in 1902 the building was raised and a patch of ground
...it was also a third time on the ground floor.
The jury from this evidence had a right to conclude
that the part of the porch which was very near defective, that the
...and could not be sustained by normal capacity
...that defendant was negligent in not maintaining the porch
in a reasonably safe condition, that he might have known by
the condition of the porch and circumstances that the porch was
likely to be unsafe, as they were, rotten and decayed after having
been exposed in the weather for so many years, and that defendant
could not avoid liability by merely saying that he had not known
of the defective condition of the porch-planks and uprights,
...the evidence conclusively established, defendant
...himself because he had no knowledge of the condi-
tion. As said in Mason v. ..., 111, 100, 131:

"...that one of the porch planks under the
...it was unsafe, or by the condition of the porch-planks and uprights
...it is a matter of common observation that planks will rot on
the underside when laid over an obstruction in which decay
...and rot without the knowledge of any person, and
...a very careful inspection of the porch at that time would
...have disclosed the fact that the planks were rotten and
...that they were rotten, while remaining apparently sound on
the top of them. Common prudence and care demanded of such
...that a careful inspection of the porch at that time would
...have disclosed the condition of the porch, it was the
...of its own chosen officer or servant, for whose negli-
gence it is liable."

...and no in the case at bar, defendant could have
...the jury from the evidence.
...it is the duty of a landlord to exercise ordinary and
reasonable care in the maintenance of porches and stairways and

to keep the same in a reasonably safe condition for persons lawfully using them. This measure of care the court embodied in an instruction to the jury, and in so doing the court did not err.

The cause went to the jury upon an additional count filed January 25, 1918, and it is contended that this count does not state a cause of action. It avers that the defendant was the owner of a building at 3408 Southport avenue, which he rented to certain parties to be occupied as a residence; that there were three floors, each occupied by a tenant; that above these floors was an attic used in common by the tenants; that from the ground to the attic were stairs and porches which were used by the tenants in common; that the rear porch of the building and the supports of the same were in a weak, worn, decayed and dangerous condition and unfit to be used and occupied; that they were dangerous to life and limb of anyone who might use the same by being thereon; that this condition was known to defendant, or in the exercise of ordinary care would have been so known by him; that weak, worn and decayed parts were covered with paint and hidden from view; that said conditions continued for a long time before the date of the accident to plaintiff, who was lawfully upon the porch at the time; that it was the duty of defendant to exercise care for the safety of plaintiff and others who might lawfully be upon said porch; that in this the defendant failed, in that he allowed the porch and supports to be in a weak, worn, decayed and dangerous condition, and that by reason of defendant's acts of omission and commission aforesaid, while plaintiff was upon the porch it gave way and she was precipitated from the second story and injured, etc. We think this count stated a good cause of action.

We find no error in procedure warranting our inter-

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ference with the judgment of the Circuit court and it is therefore affirmed.

AFFIRMED.

1944

PANNIE RUBINOVITCH,
Appellee,

vs.

WILLIAM RUBINOVITCH,
Appellant.

213 I.A. 676

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of commitment for contempt for non-payment of money due under an order of July 2, 1918, in payment of alimony pending an appeal to this court from a decree for separate maintenance entered May 29, 1918.

The decree of May 29, 1918, is, coincident with the delivery of this opinion, affirmed. It therefore remains for this court to decide whether the proceedings eventuating in the commitment are regular or erroneous.

Defendant relies for a reversal of the order of commitment, not upon the irregularity of the proceeding, but because, as he says, he has not intentionally violated the order of the court for the payment of the alimony pending the appeal from the final decree, but that he is not able to pay the full amount provided for by the order of court for the payment of alimony pending the appeal.

While defendant in his answer to the petition for the rule to show cause why he should not be held in contempt of court for non-payment of alimony, etc., undertook to show the amount of his receipts and the source of them and the amount of his disbursements and upon what account they were made, he utterly failed to show that he had lost any of the property which the decree of May 29, 1918, found he owned or possessed. In other words, defendant has not shown a lack of ability to pay

the amount ordered paid and which in terms the decree found he had property amply sufficient with which to pay. He cannot impugn the verities of that decree in the contempt proceeding. That decree is not subject to collateral attack in the contempt proceeding. Furthermore, the commitment for contempt is for disobedience of the order of July 2, 1918, which was an appealable order and from which defendant did not appeal. Blake v. Blake, 80 Ill. 523.

It follows that the reasonableness of that order is not before the court for review. In the contempt proceeding defendant could not attack the verities of the decree of May 29, 1918, or of the order of July 2, 1918.

While recourse might have been had by way of execution to enforce the lien of the decree of May 29, 1918, upon the property of defendant to satisfy the amount due, yet that did not affect the power of the court to compel payment by summary proceedings for contempt.

There was a dual remedy open to complainant - one by proceeding against the property of defendant; the other to proceed against him and punish him for contempt for failure to comply with the order. O'Callaghan v. O'Callaghan, 69 Ill. 552.

The order of the Superior Court of July 11, 1918, committing defendant as for contempt of court is affirmed.

AFFIRMED.

the court ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court. The court further ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court. The court further ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court.

It is the order of the court that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court. The court further ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court. The court further ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court.

While resources might have been had by way of means, the court ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court. The court further ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court. The court further ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court.

There was a final remedy open to complainant - the court ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court. The court further ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court. The court further ordered that the defendant be committed to the custody of the sheriff of the county of Los Angeles, California, to await the order of the court.

427 - 24780

FANNIE RUBINOVITCH.

Appellee,

vs.

WILLIAM RUBINOVITCH.

Appellant.

2131.A. 676

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HEIDOM DELIVERED THE OPINION OF THE COURT.

This is a bill by the wife against the husband for separate maintenance. The bill charges that the defendant on February 21, 1917, without any reasonable cause or justification abandoned complainant and since that time has refused to live or cohabit with her and that complainant is living separate and apart from defendant without her fault. Defendant is also charged with cruelty, drunkenness and adultery.

Although defendant in his answer denies the desertion, drunkenness and cruelty charges against him, he meets the charge of adultery in his answer in this rather unusual manner: Defendant "neither admits nor denies that he has been guilty of adulterous and licentious practices or that he has committed adultery with one Miss Clappernich on the 28th day of November, 1916, nor on the 17th day of February, A. D. 1917, but demands that strict proof be made; neither admits nor denies that at divers other times and places in said county and state of Illinois, he has committed adultery or received divers postal cards and letters from divers affinities, but demands that strict proof be made thereof." An exception to this part of the answer, if made, must have been sustained.

2131A.676

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COPIES

177

THE FOLLOWING IS A SUMMARY OF THE CASE

AND THE FACTS OF THE CASE

THE CASE IS A SUIT FOR THE RECOVERY OF

THE SUM OF \$10,000.00

AND THE RECOVERY OF COSTS

AND THE RECOVERY OF INTEREST

ON THE SUM OF \$10,000.00

AND THE RECOVERY OF COSTS

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ON THE SUM OF \$10,000.00

While these charges were fairly sustained by the proofs, they were not material to the main contention of complainant that she was living separate and apart from defendant without her fault. However, the evidence regarding the adultery charged was fairly well sustained by the admissions of defendant and the testimony of several credible witnesses. This testimony is in the record without denial.

The decree found that the parties were husband and wife and that complainant was living separate and apart from her husband without her fault; that there were three children, the issue of the marriage, living with complainant, the eldest being less than eight years of age and the youngest being but four months when defendant deserted them and her. The court decreed separate maintenance and allowed \$200 per month for the support of complainant and her children, with the right to live rent free in a flat then occupied by complainant and her children and formerly occupied as the family homestead in a building owned by defendant and his father; complainant was also awarded \$300 for solicitors' fees and defendant was ordered to pay complainant within thirty days \$530, the cost of a surgical operation, including physicians' and hospital bills, complainant having been in the hospital and undergone a surgical operation prior to the entry of the decree. The care, custody and education of the children were awarded to complainant with the right reserved to defendant to visit them at reasonable times until the court should order otherwise. The decree was made a lien upon the real estate of defendant. From this decree defendant prosecutes this appeal.

1942-1943

While these charges were fairly maintained by the
... they were not material to the main question of con-
... that she was living separate and apart from defendant
... However, the evidence regarding the subject
... maintained by the defendant of defendant
... and the testimony of several credible witnesses, this testimony
... is in the record without denial.
The record shows that the parties were married
... and that defendant was living separate and apart from
... without her fault; that there were three children
... living with defendant, the oldest
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... and as such was worthy for the
... and not defendant, with the child to live
... and her children
... as the family home was in a building owned
... and his father, defendant was also married then
... and defendant was ordered to pay defendant
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... and hospital bills, defendant having been
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... The case, custody and education of the
... with the defendant with the child removed to
... and defendant's child until the court
... The court was made a lien upon the
... From this record defendant's position
this point.

Defendant practically made no defense, either before the Chancellor or in this court, to the separate maintenance awarded by the decree. He made but a pretense in the trial court of resisting his wife's prayer for separate maintenance. He neither gave evidence himself nor proffered that of any other witness in denial of his wife's charge that she was living separate and apart from him without her fault, and the argument of defendant's counsel that this part of the decree is erroneous is feeble and pointless.

The real controversy is aimed at the allowance of support money, solicitors' fees and surgeons', physicians' and hospital charges. It is not disputed that complainant underwent a necessary surgical operation or that the amount charged for services of the surgeon, the physicians, and the hospital dues is reasonable. There were no countervailing proofs on these items, and the same is true as to the fees allowed for the services of complainant's solicitor. While defendant put upon the witness stand the physician who administered the anaesthetic to complainant for the surgeon at the time of the operation, and who owned the hospital in which complainant was operated upon, yet he refused to testify that the surgeon's charges were unreasonable, saying that he would rather not pass an opinion as to the reasonable value of an operation of the kind performed.

Complainant made detailed proof of the property and business owned by defendant and his income therefrom. There was an elaborate detailed statement made by a firm of certified public accountants covering the property and business of defendant in a most thorough manner. Defendant made no attempt to controvert this evidence and refrained from testifying himself in regard thereto. The court found that defendant was the owner of an undivided half interest in the property numbered 1334-1338 West Lake street, Chicago, and also the owner of an undivided half interest in the

Defendant practically made no defense, either by
testimony or in this court, to the charges against
him. He made but a protest in the trial court
of his wife's power for separate maintenance. He
never gave evidence himself nor produced any other
evidence in favor of his wife's charge that she was living with
him and that she was without her family, and the argument of
defendant's counsel that this part of the defense is immaterial
is not availed.

The real controversy is about the amount of
the money, collected, paid and expended, and
the charges. It is not denied that defendant's
counsel suggested payment of the amount charged for
the use of the engine, the physician, and the hospital care
in connection with the operation. There were no substantiating proofs on these
points, and the same is true as to the fees allowed for the use
of the engine, the physician's collector, while defendant put upon the
witness stand the physician who administered the anesthetic so
expensive for the engine at the time of the operation, and the
fees the physician in which defendant was operated upon, yet he
failed to testify that the engine's charges were unreasonable.
There was no evidence that the engine was used in the room
where the operation was performed, or in the kind of operation.
Defendant made detailed proof of the property and
the value of the defendant and his income situation. There was
no evidence that the defendant made by a list of detailed items
the property and business of defendant in a
detailed manner. Defendant made an attempt to convert this
evidence and retained from testifying himself in regard thereto.
The court found that defendant was the owner of an undivided half
interest in the property numbered 1234-1235 West Main Street,
and also the owner of an undivided half interest in the

premises known as 1644 South Central Park avenue, Chicago, and that he was likewise the owner of 98 per cent of the capital stock of the Rubens Metal and Iron Company, and that his assets were worth at least \$30,000, and that he was in receipt of an income in excess of \$10,000 yearly and that complainant was without property.

The uncontradicted evidence was abundantly sufficient to sustain these findings of the Chancellor. In view of the manner in which the parties lived prior to defendant's desertion of his wife and children, the delicate health of the wife and the tender years of the three children, we cannot say that the allowance made by the Chancellor, in the exercise of that sound discretion which the law reposes in a chancellor in the making of such allowances, was abused. Furthermore, the contention now made that the financial part of the decree is faulty, comes too late when made in this court for the first time. Defendant made no attempt on the trial to controvert any fact put forward by the proofs of complainant; therefore there is no foundation upon which defendant can rest any contention that the findings of the Chancellor in the decree in this record are not supported by the proofs. If the proofs of complainant were unwarranted, the facts which would so demonstrate were within the knowledge and control of defendant; and as he failed to offer any countervailing proof, he must be held to have acquiesced in the verity of such proofs.

It is urged that the Chancellor erred in making the monetary part of the decree a lien upon defendant's real estate. The rule as laid down in Johnson v. Johnson, 125 Ill. 510, is that the right to enforce a decree in separate maintenance cases by making the same a lien upon the real estate of defendant, is inherent in courts of chancery.

Defendant was liable to pay the surgeon's, physicians' and other charges made necessary by the impaired condition of his wife's health as a part of the family expenses. Moreover, the evidence supporting the allowance not having been objected to by defendant on the trial, he cannot now be heard to urge that the admission of such evidence in the making of such allowance was improper. Swartout v. Swartout, 207 Ill. App. 463.

The record being free from reversible error, the decree of the Superior court is affirmed.

AFFIRMED.

450 - 24803

HARRY W. HUBLOFF, Appellee.

vs.

ANDREW MCANISH, Appellant.

213 I.A. 676

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for \$250 against him and in favor of plaintiff entered upon the verdict of a jury.

The plaintiff is a real estate broker. One William S. Donohy informed plaintiff that he wished to buy a residence and plaintiff proceeded to find one for him. Defendant owned a residence at the northwest corner of Lawrence and Christiana avenues, Chicago. Plaintiff wrote defendant asking him to state the price of the property and the terms on which he would sell it, to which defendant answered that his price was \$10,000, that there was a \$4,000 mortgage upon the property and that he would require \$6,000 in money. This offer was submitted to Donohy, who varied it by offering to pay \$3,000 cash, assume the \$4,000 mortgage and give a second incumbrance for \$3,000. This counter-offer was submitted to defendant, and on a Sunday plaintiff went to the home of defendant and submitted to him a contract for his signature, already signed by Donohy, for a sale of the property in accord with the counter-offer made by Donohy and submitted by plaintiff. Defendant refused to do business on Sunday, telling plaintiff to come to his office on Monday, which he did, but plaintiff refused to sign the contract.

Donohy testified that plaintiff was looking for a piece of property for him and that plaintiff told him about this property and its price and the terms of payment. It is evident in the first place that plaintiff was the agent for Donohy. Even if this were not so, plaintiff would not be

[illegible]

450 - 24803

HARRY W. NURLOFF,
Appellee.

vs.

ANNE W. MCANER,
Appellant.

213 I.A. 676

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

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entitled to the commission which he sues for, because he did not find a purchaser ready, able and willing to take the property upon the terms of defendant, the counter-offer of Donohay not being accepted.

The evidence is conflicting upon the crucial question as to whether defendant agreed to the counter-proposition of Donohay, plaintiff affirming and defendant denying its acceptance; in this condition of the evidence plaintiff has failed to make out his case by that preponderance of the evidence which the law requires before he can recover. Furthermore, we do not think the evidence is in serious conflict. The contract proffered by plaintiff to defendant was not submitted until after Donohay had signed it. Plaintiff was not warranted in assuming, as he seems to have done, that defendant would accept Donohay's offer. There was therefore no meeting of the minds of the parties before the tender of the contract to defendant for his execution thereof. He then refused to execute the contract on the ground that it was not according to the terms under which he had informed plaintiff he was willing to sell the property.

The evidence in the record does not support plaintiff's claim. The verdict and judgment should have been for the defendant. Therefore the judgment of the Municipal court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

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FINDING OF FACTS.

The court finds as ultimate facts, 1st, that plaintiff was not the agent of defendant to sell the real estate for which he claims commission; and 2nd, that plaintiff did not furnish to defendant a purchaser for his property who was ready, able and willing to purchase upon defendant's terms.

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The above is a copy of the letterhead memorandum dated 10/10/34.

It is requested that you advise the Bureau of the results of your investigation.

Very truly yours,
J. Edgar Hoover

Enclosed for the Bureau are two copies of the letterhead memorandum dated 10/10/34.

Very truly yours,
J. Edgar Hoover

10/10/34

HEINEMAN LUMBER CO.,
a corporation,

Appellee.

vs.

JONES, COATES & BAILLY,
a corporation,

Appellant.

213 I.A. 677

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1795.36 in favor of plaintiff and against defendant, entered upon an instructed verdict. The correctness of the amount due plaintiff is not in dispute, but defendant filed a counter-claim, by way of set-off, of \$2551.49, for non-delivery of 750,000 feet of lumber which it claims it ordered of plaintiff on September 21, 1915, which order defendant contends plaintiff accepted.

Defendant asserts that the contract for 750,000 feet of lumber is contained in the correspondence between the parties. A careful scrutiny of this correspondence fails to reveal any such contract. Contracts do not arise inferentially; that they do seems to be the attitude of defendant in its contention that the correspondence contains the elements of a contract for 750,000 feet of lumber. Language is used in some of these letters which indicates that defendant assumed there was a contract, but such assumption finds no support in the letters. A typical letter is that of plaintiff to defendant of October 22, 1915, which was sent at the request of John J. Anderson, a lumber broker who had negotiated the 550,000 feet contract, in which letter plaintiff made a statement of the approximate amount of stock then on hand to apply on defendant's orders, and in it said: "We understand that you will continue to order this stock out at a reasonable rate, as we have en-

tered your order for all of it, as provided for in your order." This may be said to indicate a desire for further orders, but nothing more. Prices and other conditions were stipulated in the contract for the 550,000 feet of lumber. There is not one scintilla of evidence extractable from any letter showing that any price regarding a supposed order of 750,000 feet of lumber, dates of deliveries or terms of payment are mentioned; none can be supplied by inference.

It is clear that defendant utterly failed to maintain its contention that a contract existed for 750,000 feet of lumber in addition to the 550,000 feet, about which latter there is no dispute, and its claim of set-off therefore fails.

The judgment of the Municipal court is affirmed.

AFFIRMED.

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GERALDINE B. EDLUND,

Appellee.

vs.

ARTHUR E. EDLUND,

Appellant.

213 I.A. 677

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This cause comes to this court by transfer from the Supreme court - 285 Ill. 163 - to which the appeal was improvidently taken. The defendant raised constitutional questions which the Supreme court held were not in the case.

This is the second appearance of this case in this court. When the cause was here before, the divorce decree in which alimony and solicitors' fees were allowed was before us for review. We affirmed the decree as to the divorce and reversed that portion of the decree which allowed alimony because neither in the decree nor in the certificate of evidence was there any evidence sustaining the decree for alimony. See opinion in case general number 23508, not yet reported.

The error for which the alimony part of the decree was reversed by this court in case supra was remedied on the rehearing, and the evidence upon which the decree for alimony appealed from was allowed is preserved in the certificate of evidence; from it the chancellor was, we think, justified in making the allowances for alimony and solicitors' fees which appear in that decree. It was not necessary to make any averment in the bill for divorce regarding the estate and property of defendant; that was a matter for after consideration when the court might be called upon to make an allowance for alimony, solicitors' fees, etc.

ST. ALBANS

The alimony allowed by the decree before us is for permanent alimony following a decree for divorce. In the bill there is a prayer for both alimony pendente lite and permanent. This was a sufficient foundation on which to predicate an allowance of permanent alimony, solicitor's fees, etc., upon proper proof. A separate petition for an allowance of alimony and solicitor's fees is not necessary where, as in the case at bar, the bill prays for such allowances.

The testimony preserved in the record shows that defendant owned a drug store to the value of not less than \$5,000 and was making a net profit therefrom in excess of \$300 a month. While defendant denied this, he offered no books or other evidence than his bare word in contradiction of the foregoing facts.

There was no abuse of judicial discretion in the allowance made. The ten dollar allowance for charge of a doctor in making a physical examination of complainant was proper under the circumstances to be taxed as a cost in the cause; furthermore, the result of that examination was favorable to defendant's contention. It was proper also to allow the expense of \$26.90 for making a transcript of the evidence and \$35 for complainant's solicitors' fees.

The alimony decree was entered March 19, 1918, and weekly payments of \$18 ordered to be made commencing on the 23rd of February, 1918, to continue until the further order of the court. Defendant was in arrears in the payment of prior alimony, therefore the difference between dates would adjust itself without any duplication of payments. When the payment of alimony under this decree commenced, the preceding alimony ordered to be paid would automatically cease.

We perceive no error in the decree of the Circuit Court allowing alimony, solicitors' fees, etc., appealed from, and that decree is therefore affirmed.

AFFIRMED.

THE BOARD OF DIRECTORS OF THE
AMERICAN RED CROSS
HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF
THE SUM OF \$100.00 FROM THE
AMERICAN RED CROSS

THE AMERICAN RED CROSS
OF THE UNITED STATES
1515 K STREET, N.W.
WASHINGTON, D.C. 20005
JAN 10 1946

213 I.A. 677

ROSE V. SHUMAN.
Appellee,

vs.

ROBERT ECKHARDT.
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MCGURNEY DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill asking that the defendant, her tenant, be restrained from making certain alterations in the leased premises. A temporary restraining order was granted. Subsequently the case was referred to a master in chancery, who after hearing evidence recommended that the injunction be made permanent. This was done by the chancellor, and defendant appeals therefrom.

The record shows that complainant for some time prior to October 15, 1913, was the owner of premises on the east side of Sheridan Road in Chicago, the north half of which was improved with a brick and stone structure called the Hotel Grasmere. On that date a written lease was entered into between complainant and defendant, which provided for the leasing to the defendant of the Hotel Grasmere and an annex to the hotel to be erected by complainant on the south half of the premises, this addition to be built according to plans and specifications then in the hands of an architect, H. M. Waterman. The lease described the contemplated building as "a new addition" to the said hotel, and also provided that the judgment of the architect should be final as to when the addition was ready for occupancy, and that it was "to be occupied for hotel purposes only, and for no other purpose whatsoever." There was also a provision that the de-

defendant, the lessee, should not permit any alteration of or upon any part of the premises except by the written consent of the lessor, the complainant.

Defendant entered into possession of the Hotel Grasmere, and the construction of the annex proceeded to completion. There is considerable evidence touching the knowledge of the defendant as to the details of the plans and specifications, but we do not think this is of great importance, for it was proven that on April 1, 1914, defendant accepted the new building and entered into possession of the same, paying rent from March 1, 1914, and that all differences between the parties were settled. At this time the ground floor was not finished off in partitions, and while there is some argument now as to the matter, we are of the opinion that it was sufficiently proven that this was the physical condition agreed upon by the parties to be in compliance with the obligations of complainant to complete the structure. It was evidently understood that defendant could partition at his own expense and use this ground floor space as he might desire for hotel purposes, subject, however, to the approval in writing of the complainant. This is evidenced by the subsequent conduct of the parties. Defendant shortly after he took possession determined it was necessary to partition a portion of this ground space into sleeping rooms for the employes of the hotel. He wrote to complainant to this effect, submitting plans, and received from her a written reply giving her approval.

The present controversy arises over the proposal by the defendant to make a part of the ground floor of the annex into stores with entrances on Sheridan Road, to be rented to shopkeepers.

The agreement that such alterations could not be

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made without the written consent of the complainant is conceded, but it is claimed that the evidence shows a parol waiver of this condition of the lease. In Moses v. Loomis, 156 Ill. 392, it was held that a party for whose benefit a covenant is inserted into a written instrument may waive this by parol. We are of the opinion that the proof shows this rule is not applicable to the facts before us. Defendant testified as to conversations with the husband of complainant which might be construed as verbal consent to the proposed changes, but such conversations and statements to that effect are categorically denied by complainant's husband. Furthermore, there is no authority shown for the husband to bind complainant in this respect.

It is contended that defendant's testimony in this regard is supported by other facts in evidence. We do not so read the record. The evidence is conclusive that the communications with reference to alterations were in writing. Shortly after the correspondence concerning the rooms for the help there were other written communications concerning the installation of wooden closets. It also appears that thereafter defendant conducted himself towards complainant, who under the terms of the lease occupied a room in the hotel, in such a manner as to cause her to feel deeply incensed. It is unnecessary to detail defendant's actions, which were inexcusable. Complainant, feeling herself outraged by his conduct, left the hotel and took up her abode elsewhere. These matters are material only as indicating the utter improbability of any concessions on her part to defendant, as well as the improbability of any verbal agreements or understandings. Her communications to defendant continued to be by formal writings, evidently under the guidance of her attorneys. Subsequently defendant forwarded certain specifications calling for other alterations and asked for the written approval of com-

...with the witness account of the commission in question, ...
...it is claimed that the witness shows a good answer of this ...
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...a party for whose benefit a covenant is inserted into a ...
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...this rule is not applicable to the facts of ...
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plainant. This approval was withheld in a letter stating that the ground for such disapproval was that the specifications proposed "distinct and vital alterations of the structural form of the building." This letter also contained a definite statement that any work to be done by defendant on the building must be in compliance with the provisions of the lease. Subsequently other plans and specifications were forwarded to complainant, who replied refusing to give her assent. Defendant, however, disregarding this disapproval, commenced the work; later he sent her another communication with plans, stating that he intended to divide the ground floor fronting on Sheridan Road into stores.

From the conduct and threats of the defendant, complainant had reasonable ground to believe that he was determined to make whatever alterations he wished regardless of her disapproval, thus violating his obligations under the lease. Upon receiving the last communication with reference to the proposed stores, she filed her bill to restrain defendant. From a consideration of these facts and other matters appearing in the record we are of the opinion that defendant's contention that there was a parol waiver by complainant of the covenants of the lease is not established.

Support of defendant's contention is sought in the arrangement of partitions in the construction of the sleeping rooms for employees, which was done with the approval of complainant. Neither this nor the installation of certain water fixtures can be stretched into an assent by complainant to the structural alterations which she has sought to have enjoined. It is only by the exercise of ingenuity and some imagination that these things can be said to have even any remote connection with the alterations

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... and that the opposition proposed
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... with a commission with plans, stating that he intended to
... the second floor building on the same land as before.
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... of parties in the construction of the building
... which was done with the approval of complain-
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... was be attached into an account by complainant to the amount of
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to which complainant now objects. The contention that defendant was persistent and determined in overriding the wishes and rights of the complainant finds very considerable support in the record.

We hold that the injunctional decree was proper and it is affirmed.

AFFIRMED.

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ALVIN V. KONSBERG,
Appellee.

vs.

THE FRED R. JONES COMPANY,
a corporation,
Appellant.

2131.A. 677

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for commissions in securing a purchaser of a steam shovel. In his statement of claim it was asserted that the defendant and another concern were joint owners of the steam shovel; that the defendant agreed to pay a specific sum for plaintiff's services in negotiating the sale, and that the sale was negotiated by plaintiff and consummated by the principals. The only defense is as to the amount due plaintiff, the defendant claiming that there is due only a reasonable compensation and denying an agreement for a sum certain. The jury brought in a verdict favorable to the plaintiff, upon which judgment was entered, but defendant's abstract filed in this court does not show either the amount of the verdict or the judgment. The abstract is the pleading of the appellant, and if it fails to give the amount of a judgment this court cannot say whether it is excessive or otherwise. This reason alone is sufficient to require that the judgment, whatever it is, should be affirmed.

We are satisfied, however, that upon the merits the judgment, which counsel say is for \$3,000, is proper. The testimony of plaintiff and also of F. E. Houck, manager of the Chicago office of the defendant and its assistant treasurer, proves beyond reasonable controversy the agreement to pay plaintiff \$3,000 for his services. This is also corroborated

2131.A.677

RECEIVED BY THE SECRETARY OF THE TREASURY

WASHINGTON, D. C. 20540

NOV 11 1964

U.S. DEPARTMENT OF THE TREASURY
BUREAU OF CUSTOMS AND BORDER PROTECTION

THE UNITED STATES OF AMERICA

IN SENATE NOVEMBER 11, 1964

REPORT OF THE SECRETARY OF THE TREASURY

ON THE PROCEEDINGS OF THE BOARD OF CUSTOMS AND BORDER PROTECTION

IN THE MATTER OF THE APPEAL OF THE BOARD OF CUSTOMS AND BORDER PROTECTION

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IN THE MATTER OF THE APPEAL OF THE BOARD OF CUSTOMS AND BORDER PROTECTION

by a letter from the president of the defendant company to one of its subordinate officials directing that a commission of \$3,000 be paid to plaintiff. Other testimony gives ample support to the agreement as to the amount of compensation.

The objections as to the official capacity of Fred R. Jones and H. A. Wentzel are wholly without merit; indeed it was admitted upon the trial by the attorney for the defendant that Jones was the president of the defendant company. The copy of the letter from Jones, the president, to Wentzel, the treasurer of the defendant company, was admissible even though there was lack of proof that the original was mailed. This copy was given by Jones to plaintiff, and was competent as an admission made by the president of the defendant at the time the deal was closed and the money paid.

Apparently upon the trial defendant claimed that another company, which had not been made a defendant, was jointly liable. The court instructed the jury that if they believed that the defendant company and the other company jointly and severally, or that the defendant company separately, promised to pay plaintiff \$3,000 for his services, they should assess the plaintiff's damages at that amount. Defendant now complains of this instruction on the ground that there was no evidence of any joint promise. If this is true defendant is not injured and has no ground of complaint as to the instruction.

Any argument is futile based upon the supposition that there was an understanding between defendant and any other party that the expense of commissions should be divided equally between them. Even if this were the fact it would not relieve defendant of its liability to plaintiff for the whole amount.

Plaintiff has filed a motion in this court to have statutory damages assessed on the ground that the appeal was taken for the purpose of delay. The defense presented is so

of a letter from the president of the defendant company to the
the defendant officials directing that a commission be
to be paid to plaintiff. Other testimony gives credit and
to the amount of compensation.

The objection as to the official capacity of

Testimony and H. A. Hancock are wholly without merit;

it was admitted upon the trial by the attorney for the

defendant that Jones was the president of the defendant com-

pany. The copy of the letter from Jones, the president, to

plaintiff, the president of the defendant company, was admitted

into evidence. There was proof of proof that the original was mailed.

This copy was given by Jones to plaintiff, and was compared as

to the copy made by the president of the defendant at the time

the trial was closed and the money paid.

Apparently upon the trial defendant claimed that

plaintiff company, which had not been made a defendant, was

jointly liable. The court instructed the jury that it they

believe that the defendant company and the other company

jointly and severally, or that the defendant company separately,

should be pay plaintiff \$8,000 for his services, they should

return the plaintiff's damages at that amount. Defendant now

insists of this instruction on the ground that there was no

evidence of any joint promise. If this is true defendant is not

liable and has no ground of complaint as to the instruction.

Any argument is futile based upon the supposition

that there was an understanding between defendant and any other

party that the expense of commission should be divided equally

between them. Even if this were the fact it would not relieve

defendant of its liability to plaintiff for the whole amount.

Plaintiff has filed a motion in this court to have

defendant's answer dismissed on the ground that the appeal was

on for the purpose of delay. The defense presented is to

wholly devoid of substance or merit as to incline us to view the motion favorably. We shall therefore enter judgment against defendant in this court of ten per cent. on the judgment below, amounting to \$300, as statutory damages for delay. The judgment of the trial court is affirmed, and judgment for statutory damages against the defendant is entered in this court.

AFFIRMED WITH DAMAGES FOR DELAY.

County of ... State of Texas, ss. I, the undersigned, Judge of the County Court, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files of the County Court.

Witness my hand and the seal of the County Court at ... this ... day of ... 19...

... Judge of the County Court.

... County Clerk.

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GUSTAV A. WOLTER,

Appellee.

vs.

CHRISTINE SZAMEIT et al.

(Defendants)

On Appeal of CHRISTINE SZAMEIT,
individually and as executrix of
the last will and testament of
Wilhelmine Gebhardt Wolter,
deceased, and WILLIAM KRUEGER,
Appellants.

213 I.A. 677

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Appellants seek the reversal of an order denying their motion to vacate a decree entered by default.

Wilhelmine Gebhardt Wolter died in April, 1916, without issue and left her surviving Gustav A. Wolter, her husband, Christine Szameit, her sister, and a number of nephews and nieces as her only heirs at law and next of kin. By her will she gave to her husband one dollar in cash, and named as executrix the said Christine Szameit, to whom letters testamentary were granted by the Probate Court. The husband, as was his right under the statute, on April 16th filed in the Probate Court his renunciation to take under the terms of the will, and elected in lieu thereof to take such share of the estate as he would thereupon by law be entitled to.

Subsequently, on May 2, 1917, by bill of complaint in the Circuit Court, Wolter prayed among other things that the will in question and the probate thereof be set aside and declared null and void and the purported writing be held not to be the last will and testament of the said deceased. The appellants in apt time filed their appearance and plea.

On Monday, March 4, 1918, there were a number of

21814.077

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: ESTATE OF
WILLIAM A. WOLTER

WILLIAM A. WOLTER, deceased.
WILLIAM A. WOLTER, executor.
WILLIAM A. WOLTER, administrator.

1. That the said WILLIAM A. WOLTER died on the 10th day of April, 1910.

Applicant took the inventory of the estate of the said WILLIAM A. WOLTER.

There was a decree entered by the court.

WILLIAM A. WOLTER died on the 10th day of April, 1910.

and left her surviving husband, WILLIAM A. WOLTER, her

husband, WILLIAM A. WOLTER, her sister, and a number of nephews

and nieces as her only heirs at law and next of kin.

and gave to her husband one dollar in cash, and named as

executor of her estate WILLIAM A. WOLTER, her husband, to whom letters testamentary

were granted by the Probate Court. The husband, as executor, filed

the account, on April 10th, 1910, in the Probate Court and

submitted to the court the same under the name of the will, and stated

in his report to take such share of the estate as he would

be entitled to.

Independently, on May 2, 1917, by bill of complaint

in the Circuit Court, WILLIAM A. WOLTER proved again that the

will in question and the probate thereof he was valid and de-

clared null and void and the purpose was to have the will set aside

the final will and testament of the said WILLIAM A. WOLTER. The bill was

in and filed their appearance and plea.

On motion, March 4, 1910, there was a number of

cases on the contested motion call of the trial judge, and on the same sheet, about one-third of the way down, there appeared, not as a distinct and separate heading but inconspicuously and on the same line as the title to one of the cases, the words "Trial Call at 2 p. m.," followed by a list of cases including the one now before us. From the affidavit of the then solicitor for appellants it appears that on Saturday, March 2nd, he went to the court room and looked at the sheet on the clerk's desk, and upon inquiry was informed by the clerk that contested motions would be heard on the Monday following; that affiant in looking over the number of contested motions did not notice that there was also a trial call for Monday at 2 p. m. because of the peculiar appearance of the sheet so placed on the clerk's desk. He was thus misled into believing that the list contained only contested motions; the Law Bulletin had no notice that the case was on the trial call for the following day or the next, March 6th. On this day, in the absence of appellants or their counsel, the decree was entered holding the will void on the grounds of mental incapacity of the testatrix and "undue arts and fraudulent practices" of Christine Szameit, her sister, one of the appellants. Shortly thereafter, on March 9th and on March 13th, during the same term, the said solicitor and the present attorneys, respectively, presented motions supported by affidavits to have the decree set aside, which affidavits set up that the defendants have a good and meritorious defense to complainant's bill, but upon hearing such motions were denied. In his affidavit the said solicitor also volunteered to compensate complainant's solicitor with such reasonable fee as might be directed by

...on the ... of the ... and on ...
... about one-third of the way down, where ...
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... he went to the court room and looked at the ...
... and when ... was informed by the clerk ...
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... of their ... the ... was ...
... on the grounds of mental ...
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the court for time spent in attendance in court and in the preparation of the decree and for other services rendered in connection with the cause, and that he was ready and willing to pay witness fees and such other obligations as may have been incurred by reason of the default having been taken.

Any discussion of the pleadings is now immaterial. We hold that the mistake of the counsel was partially excusable and one which in equity should not deprive his clients of their day in court, in such an important matter as the validity of a will. The attitude of reviewing courts towards situations of this kind was well expressed in the opinion in Mason v. McNamara, 57 Ill. 274, where it was said:

"As a general rule this court will not review the actions of the lower court in matters of discretion. But cases may arise in which there has been such a state of facts as to call upon this court to interpose to promote justice, by reviewing the decision * * * As we understand the long and well settled practice in this state, the court has always been liberal in setting aside defaults at the term in which they were entered * * where it appears by affidavit that the party has a defense to the merits, either to the whole or a material part of the action * * if a reasonable excuse is shown for not having made the defense."

This holding was adopted in the more recent case of McMurray v. Peabody Coal Co., 281 Ill. 218.

The order of the Circuit Court, for the reasons indicated, is reversed and the cause is remanded with directions to allow the motion of appellants to vacate the decree of March 6, 1918, and for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

259 - 24610

J. F. LYON, trading as
J. F. LYON & CO.,
Appellee.

vs.

ALFRED F. ANDERSON,
Appellant.

213 I.A. 678

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSHERLY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a real estate broker, brought suit for commissions for services in the matter of leases of a building belonging to the defendant. Upon trial before a jury a verdict of \$96.93 in favor of the plaintiff was returned, upon which judgment was entered. Defendant asks that it be reversed.

Much law has been presented, but the determination of the case rests upon the simple proposition as to the contract of the parties. Defendant gave plaintiff written authority to act as agent for his property for the period from March 3, 1917, to March 1, 1918, but this writing contains nothing about compensation. This rests in a conversation between a Mr. McCabe, an employe of the plaintiff, and the defendant. McCabe testified that he told Anderson that the compensation to plaintiff would be $2\frac{1}{2}$ per cent, commission on all leases made through plaintiff's office. Anderson testified that it was to be $2\frac{1}{2}$ per cent. on all rent collected. The jury evidently accepted the version of plaintiff, and there is not sufficient in the record to justify our setting aside its conclusion.

There is much controversy as to whose fault it was that the agency was terminated in May, 1917. It is unnecessary to determine this, as plaintiff is claiming only

876 A.1313

for services rendered in negotiating and drawing up leases prior to the time defendant himself took charge of the property.

There was testimony by real estate experts that for such services as were rendered by plaintiff $2\frac{1}{2}$ per cent. commission on the rent named in the leases was the usual, customary and reasonable commission in Chicago and Cook County. There is no dispute as to this, but it is objected that such testimony was incompetent as there was an express contract between the parties. It is sufficient to say that the terms of the contract were in dispute, and if the evidence failed as to the existence of the contract, testimony as to the customary and reasonable charges would be competent.

It is also urged that it was improper to admit evidence concerning an offer of payment made by defendant to plaintiff, on the ground that this was simply an offer of compromise. Such testimony is usually incompetent, but in the present case, as defendant seems to admit liability for some amount, we do not think the admission of this testimony should require a reversal.

The essential points in the case are questions of fact which the court properly left to the jury, and no sufficient reason has been presented to lead us to conclude that the verdict was manifestly wrong. The judgment is therefore affirmed.

AFFIRMED.

The witness testified in negotiating and throwing up hands
that at the time he himself took care of the money.

There was testimony by both sides of the money being
left in the hands of the witness as was mentioned by the witness of the case.
Testimony on the part of the witness in the hands of the money.
Testimony and reasonable conclusion in Chicago and Cook
County. There is no dispute as to this, but it is admitted
that the witness was responsible as there was an express
contract between the parties. It is admitted to say that
the terms of the contract were in dispute, and if the evidence
is not to the satisfaction of the court, testimony as to the
witness and reasonable changes would be suggested.

It is also noted that it was improper to admit
evidence concerning an offer to accept made by defendant in
testimony, on the ground that this was simply an offer of dan-
gerous testimony to himself independent, but in the
view of the court, as defendant seems to admit liability for some
amount, we do not think the admission of this testimony should
be excluded.

The essential points in the case are questions of
fact which the court properly left to the jury, and we con-
clude that the evidence has been presented to lead us to conclude that
the verdict was manifestly wrong. The judgment is therefore

REVERSED.

HENRY ELLRICH,
Appellee.

vs.

H. H. CURTIS,
Appellant.

213 I.A. 678

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MCGURRY DELIVERED THE OPINION OF THE COURT.

Defendant seeks the reversal of a judgment against him of \$400, entered by confession on a lease. He filed a motion in the trial court asking that this judgment be set aside, supporting the same by affidavit. The court denied his motion, and the judgment stood.

It is the rule that a defendant seeking to vacate a judgment by confession must show by affidavit a good and meritorious defense. Mahoke v. Harzen, 208 Ill. App. 153; Blanks v. Mills, 205 Ill. App. 542; Brunswick v. Hurley, 131 Ill. App. 235. And such affidavit will be construed strictly against the party presenting it. Faisley v. Michels, 190 Ill. App. 354; Crossman v. Wohlleben, 90 Ill. 537; Chicago Fireproofing Co. v. Park Nat'l Bank, 145 Ill. 481. Such a motion is addressed to the sound discretion of the court, and his conclusion will not be disturbed unless it appears that this discretion has been abused. Furman v. Wiczorkowski, 202 Ill. App. 347; Blake v. State Bank of Freeport, 178 Ill. 182.

The gist of defendant's affidavit supporting the motion to set aside the judgment was the alleged failure of plaintiff to do certain work on the premises. These items are of minor importance, such as fixing a lock, smokestack, etc.; it is asserted that the covenant of the landlord to do these things is contained in the lease. However, on reference to the lease as it

870 .A.1615

is set out in the abstract we find no such covenant or any covenant whatever obligating the landlord to make any repairs. There is no merit, therefore, in this point.

The affidavit also contains a statement that the defendant returned the keys of the premises "to the duly authorized agent of lessor, who accepted the same." This is far from presenting facts showing any agreement to terminate the lease.

Counsel has argued at length as to what the defendant would be able to prove upon a trial, but we cannot examine into these statements. As above said, in determining whether the trial court abused its discretion we look only to the affidavit presented. Examining this in the light of matters appearing in the abstract before us, no defense of merit is seen.

The order of the trial court was proper, and the judgment is affirmed.

AFFIRMED.

SOLOMON KABAKER, Trustee,
Appellee,

vs.

LOUIS COHEN,
Appellant.

213 I.A. 678

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was the lessor in a lease of certain premises in Chicago to Louis Cohen, the defendant, which expired April 30, 1918. On June 10, 1918, complaint in forcible detainer was filed, and upon trial by the court judgment awarding plaintiff possession was entered, from which defendant appeals.

The record justifies this judgment, and the points made in opposition on the appeal are wholly without merit. The premises are described with reasonable certainty, and the action is brought by the proper party. The fact that the landlord brought the action of forcible detainer at the expiration of the term of the lease is an election by him to treat the tenant as a trespasser, and it is unnecessary in such an action to require the landlord to elect and state at the trial whether the defendant is a trespasser or tenant. The cases cited by the defendant are cases in actions for rent; the instant case is an action for possession of the premises. A demand for possession before bringing the action was not necessary. Condon v. Brockway, 187 Ill. 90.

The judgment is affirmed.

AFFIRMED.

872. A. I. C. I. S.

THE GREAT WALL

JOHN ENRIGHT, Jr., a minor,
by next friend, etc.,
Appellee,

vs.

T. KARLOWSKY et al.

On Appeal of JAMES KRAL,
Appellant.

213 I.A. 678

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MCGURNY DELIVERED THE OPINION OF THE COURT.

John Enright, Jr., a minor, hereinafter called plaintiff, by his next friend, brought suit against James Kral, hereinafter called defendant, and others, to recover damages for personal injuries. Upon the trial the jury were instructed to return a verdict favorable to the other defendants. The case was submitted to the jury as to the liability of Kral, and a verdict was returned against him for \$500 upon which judgment was entered, from which defendant appeals.

In September, 1915, the defendant, a contractor, was engaged in the construction of a two story brick building in Chicago, and on the day of the accident, September 25th, this was completed except the roof, the front porch floor, the windows and interior finish. In constructing the building the contractor used a small hoist or elevator to carry hods of mortar and brick from the first to the second floor. It was a double hoist, so constructed that when one went up the other came down, and was operated by a small windlass on the second floor. On Saturday afternoon, after the workmen had left the building, plaintiff with some other boys went into the building and commenced to play with this hoist by riding it up and down. In some way, which is not entirely clear, while doing this plaintiff received the injuries for which he sues.

873 A.1615

There are at least three reasons why this verdict and judgment cannot stand. (1) Plaintiff charged that the hoist was an attractive nuisance which defendant failed to guard from children of tender years. The doctrine of attractive nuisance contemplates that the minor who is attracted thereto is so young and so lacking in capacity and discretion as to fail to comprehend the danger. Heimann v. Kinnare, 190 Ill. 156; McDermott v. Burke, 256 Ill. 401; Hanna v. I. C. R. R. Co., 129 Ill. App. 134; Wabash R. R. Co. v. Jones, 163 Ill. 167, and cases cited in these opinions. This rule is not applicable to this plaintiff; he lacked a few days of being 12 years and 5 months old, a school boy of normal intelligence and the usual experience of a city boy. By special interrogatory there was submitted to the jury whether the plaintiff was "just before and at the time of the injury, of sufficient age and mentality to understand the nature and consequences of his acts in entering said building and in using the elevator." To this the jury answered in the affirmative. The hoists were so constructed that when one reached the second floor it would automatically lock with a dog, which required some mechanical intelligence before plaintiff could have moved the hoists. These circumstances take the case without the operation of the theory of attractive nuisance cases. Plaintiff was clearly of sufficient intelligence to comprehend the danger and to use sufficient care to avoid it, and hence cannot recover in this action.

(2) The evidence shows that these hoists could not be seen from the street and that plaintiff and his comrades did not see it until they had gotten inside the building. McDermott v. Burke, 256 Ill. 401, involved an apparatus and circumstances similar to those in the instant case; it was there held that "the dangerous thing must be so located as to attract them from the street or some public place where they may be expected to be. An owner would not be liable if he maintained something for his own use which might be

dangerous but which would only be found by children going upon his premises as trespassers." The evidence shows that the hoist operated by defendant was located about the center of the building, 25 feet from the building line and 45 feet from the sidewalk on the street; between the sidewalk and the building there was an outer wall for a porch, which was 8 feet high and stood about 10 feet from the building. In the rear it was a distance of 7 feet from the ground to the door step, and a distance of 10 feet to the windows of the first floor. A playmate of plaintiff who entered the building with plaintiff, testified that he could not see the elevator from the sidewalk, and that he first saw it after they had climbed up into the building from the rear by a plank, and that to reach the windlass which operated the hoist from the second floor the boys had to climb up the frame work of the partitions, as there were no ladders or stairways. We are of the opinion that what is said in the McBennett case, supra, is applicable to the present situation and precludes a recovery.

(3) Plaintiff failed to prove negligence on the part of the defendant. The evidence shows that when the workmen left at 12 o'clock noon Saturday they fastened the hoists securely with a chain and lock, which made them immovable. They then removed all the ladders and runways. A watchman who lived nearby was employed to keep children and boys away from the building. About 1 o'clock this watchman saw some boys around the building and chased them away; about two hours later he went again to the building and found the lock on the hoist broken and the chain removed and lying on the second floor. The evidence that the hoist was fastened by the lock and chain is convincing, and it would seem self evident that some of the boys, either the plaintiff or his companions, broke the lock so as to operate the hoists. It is common knowledge that it is very difficult to

...but which would only be found by ...
...the evidence shows that the ...
...was located about the corner of the ...
...from the building line and at least two ...
...between the sidewalk and the building ...
...for a porch, which was a few feet ...
...the building. In the case it was a distance of ...
...to the door step, and a distance of ...
...the floor. A plaintiff of ...
...with plaintiff, testified that he ...
...the distance from the sidewalk, and that he ...
...and climbed up into the building from the ...
...to reach the window which opened the ...
...the boys had to climb up the frame work of ...
...as there were no ladders or ...
...that is set in the ...
...to the present situation and ...
...Plaintiff failed to prove negligence on the ...
...The evidence shows that when the ...
...at 12 o'clock noon ... they ...
...a chair and foot, which were ...
...all the ladders and runways. A ...
...was employed to keep ... and boys ...
...About 1 o'clock this ... and boys ...
...and opened them away; about two hours ...
...to the building and found the ...
...removed and lying on the second floor. The ...
...that the hotel was ... by the foot and ...
...and it would seem self evident that some of the boys ...
...the plaintiff or his ... prove the fact ...
...the hotel, it is common knowledge that it is very difficult to

keep boys away from a building in course of construction. In removing the approaches to the building and in employing a watchman, defendant seems to have done everything that could reasonably be expected. The important point, however, with reference to the hoist is that it was securely fastened so that it could not be operated until the chain was removed, and that this was accomplished by forcibly breaking the lock. Defendant was not required to have the property and machinery proof against all and any assaults by trespassers; he was required to use reasonable and ordinary care, and we are of the opinion that the evidence shows he did so in this case.

For the reasons above indicated the judgment is reversed, and as there can be no recovery a finding of fact will be entered.

REVERSED WITH FINDING OF FACT.

... was taken from a building in course of construction in
... the apartment to the building was in employed a watch-
man, who stated there to have been everything that could reasonably
be expected. The apartment was, however, with reference to the
... it was immediately intended so that it could not be
... the chain was removed, and that this was accom-
plished by carefully breaking the lock. The door was not re-
closed to leave the property and machinery intact against all and
was attended by the apartment. He was returned to the apartment
and immediately after, and as one of the reasons that the witness
... in this case.

For the reasons above indicated the witness is
... and as there can be no recovery a finding of fact
will be entered.

293 - 24644

FINDING OF FACT.

This court finds as an ultimate fact from the evidence in the record that the defendant was not guilty of the negligence charged in plaintiff's declaration or any count thereof.

THE
 OFFICE OF THE
 SECRETARY OF THE
 ARMY
 WASHINGTON, D. C.

TO THE
 SECRETARY OF THE ARMY
 WASHINGTON, D. C.

FROM
 THE
 SECRETARY OF THE ARMY
 WASHINGTON, D. C.

314 - 24665

EDWARD S. GLICKAUF, Adminis-
trator of the Estate of
Wolfe Adolphus, deceased,
Appellee,

vs.

ANNA W. KENDALL,
Appellant.

213 I.A. 678

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSHURELY DELIVERED THE OPINION OF THE COURT.

This action was commenced by Wolfe Adolphus, afterwards deceased, upon a promissory note for \$1,000 said to have been executed by the defendant to the order of "myself" and by her endorsed, and afterwards acquired by Adolphus as an innocent holder for value, before maturity, without notice. Defendant denied this by affidavit of merits, in which she asserted that the note was one of a series obtained by a man named H. W. Thomas through fraud and misrepresentation; that none of them was executed for any consideration; that the note was part of a scheme to defraud defendant, of which Adolphus had full knowledge when he received the note, and that he merely took it to collect same for Thomas and to avoid the defense of fraud against the note in the hands of Thomas. There was also an additional affidavit of merits denying the execution of the note and the endorsements. Before the case was reached for trial Adolphus died, and his death was suggested and Glickauf, administrator of his estate, was substituted as plaintiff. Upon the trial the court struck out substantially all the testimony on behalf of the defendant tending to support her affidavit of defense and instructed the jury to return a verdict for the plaintiff. This was done, and judgment thereon for \$1,200 was entered. Defendant asks that

this be reversed and the cause remanded for a new trial.

It is first objected that there was a variance between the instrument offered in evidence and the one described in the statement of claim. Whatever variance there may have been was cured by order of court in permitting an amendment of the statement of claim. Bauer Grocery Co. v. Zelle, 172 Ill. 407; also Practice Act, sec. 39.

Objection is made to the admissibility of the testimony of the witness Belfosse as to the signature of defendant to the note. The burden was on plaintiff to prove the execution of the note where such execution was denied by the defendant. In Riggs v. Powell, 142 Ill. 453, it was said that a witness to be competent to testify to handwriting must be acquainted with it, either from having seen the party write or by having been acquainted with such handwriting in business transactions, so that from memory he can give an opinion as to the genuineness of the signature. This rule should be observed. A number of endorsements appear on the note, including the name "W. Adolphus"; the genuineness of this endorsement was denied by the affidavit of merits; this made it incumbent upon plaintiff to prove them. Johnston v. Lear, 145 Ill. App. 443; Walsh v. Marvel, 130 Ill. App. 305.

Defendant offered as a witness Samuel B. Hill, her attorney in the case. The record shows that he attempted to enter his withdrawal as attorney, but this was objected to by counsel for plaintiff, which objection was sustained by the court. Hill testified that he was to receive a fee irrespective of the outcome of the suit and that this would not be changed whether his client won or was defeated. He then testified as to conversations with Adolphus concerning the note in question, for the purpose of showing that Adolphus had notice of the alleged fraud and misrepresentation before he acquired the note, but

his entire testimony was held incompetent and stricken out on the ground that he was a party in interest and therefore incompetent as a witness, under the statute on Evidence and Depositions, chapter 51, sec. 2. The rule is that the interest in the event of a suit which disqualifies a witness must be a direct financial interest, and that the evidence of an agent, uncoupled with such interest in the result, is not incompetent. Ackman v. Potter, 239 Ill. 578; Wright v. Whitaker, 137 Ill. App. 598; Seaver v. Ritchie, 152 Ill. App. 130. In Jones v. Abbott, 235 Ill. 220, it was said that the test of interest is whether the witness would immediately gain or lose by the event of the suit. See also Standley v. Moss, 114 Ill. App. 612, and Chicago City Ry. Co. v. Nager, 185 Ill. 337, in which opinions Greenleaf on Evidence is quoted (vol. 1, sec. 386):

"It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced, for these go only to the credibility."

In the light of these decisions it was error for the court to exclude the testimony of Hill, which should have been permitted to go to the jury.

We see no reason why the trial court should not have permitted Mr. Hill to withdraw as attorney; and before he testifies upon another trial his withdrawal should be entered.

In Delfosse v. Kendall, 283 Ill. 301, the court had under consideration a suit upon a note given by the present defendant to H. E. Thomas in a series of which the instant note is one. We understand that opinion to hold that proof of the transactions and circumstances of the execution and delivery

of the notes to Thomas is an adequate defense.

For the errors upon the trial as above indicated,
the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

THE UNITED STATES OF AMERICA
DO hereby certify that
the within and foregoing is a true and correct
copy of the original as the same appears
in the records of the Department of the Interior.

WITNESSED my hand and the seal of the
Department of the Interior at Washington
this 10th day of March 1900.

Director

U. S. DEPT. OF THE INTERIOR

WASHINGTON

1900

For the Director
J. H. ...

1900

U. S. DEPT. OF THE INTERIOR

WASHINGTON

378 - 24731

A. L. FISHER,
Appellee,

vs.

GEORGE W. FAULKNER and JOHN F.
COOK, trading as Faulkner &
Cook,
(Defendants)

GEORGE W. FAULKNER,
Appellant.

213 I.A. 679

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSHURELY DELIVERED THE OPINION OF THE COURT.

Defendant Faulkner seeks by this appeal to have a judgment of \$10 against him reversed.

There seems to be no dispute on the merits; at least nothing appears in the abstract relating thereto. The point seems to be as to the propriety of the court, after hearing, in permitting an amendment of the pleadings. The suit was brought against Faulkner and Cook, which plaintiff alleged in his statement of claim was a partnership real estate firm, indebted to him for the sum of \$10 for a deposit made on a rent proposal. The summons against the firm name was returned as served on George W. Faulkner and John F. Cook, and their appearance by an attorney was entered, and subsequently a default judgment against these individuals was entered, which afterwards was vacated and an affidavit of merits filed. Apparently there were other orders entered which resulted in a trial with a finding and judgment against the defendants, George W. Faulkner and John F. Cook. Motion was made to vacate and set ^{this} aside, which was overruled, as was a motion in arrest of judgment.

Plaintiff was allowed by the court to amend the pleadings and papers in the cause so as to read "George W. Faulkner and

070 A.1312

Journal of Interpersonal Violence 28(12)

THE UNIVERSITY OF CHICAGO PRESS

John F. Cook, operating business in the name of Faulkner & Cook." Such an amendment is in accord with the universal practice in our courts, and is specifically permitted under section 46 of the Municipal Court Act, which provides that amendments to statements of claim and other papers filed by either party may in the discretion of the court be allowed at any time.

The points made by defendant in his brief are wholly without merit, and the judgment is affirmed.

AFFIRMED.

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391 - 24744

FRANK J. O'BRIEN,
Appellee.

vs.

ASHER R. GLOCK,
Appellant.

213 I.A. 679

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In an action for trespass plaintiff had a verdict of the jury for \$2,000, which at the suggestion of the trial court was remitted to \$1,000. Judgment was entered for this latter amount, and defendant by this appeal seeks its reversal.

Much of defendant's argument in this court relates to the rule in cases of malicious prosecution, and is not relevant. The three counts of the declaration allege (1) assault and battery; (2) false arrest; (3) forcibly expelling plaintiff from his store. The case was tried upon the theory of false arrest. The rule is that a person may justify an arrest by showing that a criminal offense has actually been committed or attempted in his presence. Criminal Code, Hurd's Stat., par. 342. When called upon to justify the arrest he must be able to show the offense was committed in his presence. In an action for trespass and false imprisonment, probable cause and the absence of malice constitute no defense. There must be an existing legal cause for the arrest, and that cause must be a law violated. Such ^a form of action must be distinguished from an action for malicious prosecution. In an action for trespass and false imprisonment, opinion or belief as to the guilt of the party arrested, no matter how strongly held or fortified, will not justify the deprivation of another of his liberty, in the absence of commission of a crime. See Markey v. Griffin, 109 Ill. App. 212, and large number of

940 1618

cases there cited. In Enright v. Gibson, 219 Ill. 550, this rule was re-asserted, the court saying that the citizen must not be permitted to take the law into his own hands and make arrests upon suspicion or upon probable cause of guilt; that if the citizen, without observing formalities of law, "may constitute himself an officer and jailer upon mere suspicion or probable cause of guilt of the accused person, it would place in the hands of the vicious or ill-disposed a power the exercise of which might result in a greater evil than might arise from the occasional escape of guilty parties before the officers can be called or the forms of law observed."

The evidence tends to show that the defendant owned a store on Milwaukee avenue, in Chicago, which was under lease to the plaintiff, who conducted there a candy and popcorn business. The lease was in writing, for a term from November 1, 1914, to October 31, 1915, but with a provision that the lease would be continued under the same terms after expiration, until October 31, 1917, in case the lessor did not sell the premises. There was evidence tending to show that plaintiff paid the rent up to October 31, 1915. He still continued in possession in November and, going to his place of business on the morning of November 12th, he found a new padlock on the door of his store, locked so as to prevent him from entering. Plaintiff, in company with his brother-in-law, secured a small hatchet and screw driver to remove the lock. Plaintiff started to take the screws out of the hasp, when the defendant, who had appeared on the scene, summoned a police officer and ordered him to arrest plaintiff. The officer replied that he had no order and could not arrest him, but that if defendant would go to the station and sign a complaint against plaintiff he would place plaintiff under arrest. The officer then put plaintiff and the defendant in a police patrol wagon and sent them to the station. Defendant stated that he wanted plaintiff arrested for the reason

The witness tends to show that the defendant owned a place in witness avenue, in Chicago, which was under lease to the defendant, who conducted there a candy and popcorn business. The lease was in writing, for a term from November 1, 1914, to December 31, 1915, but with a provision that the lease would be annulled after the same term after expiration, unless October 31, 1917. In fact the lease did not call the provision, which was not made known to show that plaintiff paid the rent up to October 31, 1915. He still continued in possession in November and, being in the possession of business on the morning of November 19th, he found a new person on the door of the store, looked at him to prevent him from entering. Plaintiff, in company with his brother-in-law, saw a small hatch and saw driver to remove the hatch. Plaintiff then started to take the hatch out of the back, when the defendant came and appeared on the scene, summoned a police officer and ordered him to arrest plaintiff. The officer replied that he had no order to arrest him, but that if defendant would go to the police and sign a complaint against plaintiff he would place plaintiff under arrest. The officer then put plaintiff and the defendant in a police patrol wagon and sent them to the station. Defendant stated that he wanted plaintiff arrested for the reason

that he had no business in the property and that he wanted his rent. At the police station the desk sergeant advised defendant to commence a civil suit, but defendant replied, "I know what I am doing; lock this man up." There is evidence tending to show that the defendant insisted upon the plaintiff being locked up. Thereupon the desk sergeant drew up a complaint which was signed by the defendant, and a warrant was issued. Plaintiff immediately gave bail and left the station. Upon the hearing of the charge against him he was discharged. The jury, having heard the variant stories of the witnesses, could reasonably believe the above statement to be substantially in accord with the facts of the occurrence. Under the law defendant was not justified in procuring plaintiff's arrest, and the jury properly held him answerable in damages.

Complaint is made of the conduct of plaintiff's counsel and of the rulings of the court upon the evidence, but we find nothing in this respect which would compel a reversal.

It is said that the court should have submitted certain special forms of verdict to the jury. These are not properly forms of verdict, but merely interrogatories upon evidentiary facts. The special verdicts contemplated by the statute are restricted to ultimate facts. The court properly refused to submit these special interrogatories.

It is complained that the verdict is excessive, and we are inclined to hold that this is true. Plaintiff was in fact very slightly inconvenienced. He and the defendant rode together in the patrol wagon, and were in the police station only a short time. Plaintiff was not locked up at any time; and while it is argued that his business was ruined by reason of this, there is very little to support this contention. He seems to have been absent from his business at most only a few hours. We are inclined

It is very likely to support this suggestion. He seems to have been
it is argued that his business was ruined by reason of this, there
any time. Plaintiff was not looked up at any time; and while
regard to the hotel wagon, and were in the hotel station only
and very slightly inconvenienced. He and the defendant rode
and are inclined to hold that this is true. Plaintiff was in
It is complained that the verdict is excessive.
which have special investigators.
the verdict to minimize loss. The court properly refused to
justice here. The special verdict contemplated by the statute
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certain special forms of verdict in the law. These are not
It is said that the court should have excluded
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verdict of the findings of the court upon the evidence, but
Complaint is made of the conduct of plaintiff's
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the jury, having heard the verdict stating
and was not an action. Upon the hearing of the charge against
verdict, and a verdict was returned. Plaintiff immediately gave
his last statement drew up a complaint which was signed by the de-
Plaintiff called upon the plaintiff being looked up. Thereupon
that this was "p. There is evidence tending to show that the de-
about a week later, but defendant replied, "I know what I am doing;
in his police station the book sergeant advised defendant to com-

to think that the large verdict returned by the jury must have resulted from certain extraneous circumstances which properly should have had little influence. Ample compensation to plaintiff under the evidence would be \$500, and we cannot allow a judgment to stand for more than this amount. If, therefore, within fifteen days from this date the plaintiff shall remit \$500 from his present judgment it will be affirmed; otherwise the judgment will be reversed and the cause remanded. All costs in this and the trial court to be taxed against the defendant.

AFFIRMED UPON REMITTITUR; OTHERWISE
REVERSED AND REMANDED.

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431 - 24784

MARY WINTER,

Appellee,

vs.

MERCHANTS RESERVE LIFE INSURANCE
COMPANY,

Appellant.

213 I.A. 679

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant seeks by this appeal to have reversed a judgment against it of \$2,225, in a suit upon a life insurance policy issued by the defendant.

The bill of exceptions, upon motion, has been stricken from the record, so that we have before us only the statutory record. The only point, therefore, which we are at liberty to consider is whether the statement of claim states a cause of action. This is a case of the first class in the Municipal Court, and under a rule of that court pleadings in all cases of the first class shall be the same as in cases of the fourth class (Rule 14). By section 46 of the Municipal Court Act it is provided that the statement of claim in fourth class cases, if the suit is upon a contract, shall consist of a "statement of the account or of the nature of the demand." The statement filed herein asserts the issuance by the defendant of an insurance policy for \$2,000 upon the life of plaintiff's husband, and that the policy contained a clause providing for the payment of \$2,000 upon the death of the insured; that the insured died on October 1, 1915, and that plaintiff is the beneficiary in the policy. The statement gave the number of the policy, with an offer to produce the original in court. The affidavit attached, made by plaintiff, states that the demand is for \$2,000 upon said

2181.A.679

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at New York, this 1st day of October, 1910.



...the bill of exchange, upon motion, has been
...the record, so that we have before us only the
...the only point, therefore, which we are at
...the statement of claim states a
...this is a case of the first kind in the
...and under a rule of that court providing in
...the same as in cases of
...By section 4 of the Insurance Law
...it is provided that the statement of claim in fourth class
...shall consist of a statement of the amount of the loss
...of the nature of the demand. The statement
...the amount of the loss sustained by the insured or by
...policy for \$2,000 upon the life of plaintiff's husband
...and that the policy contained a clause providing for the
...of \$2,000 upon the death of the insured; that the insured
...October 1, 1910, and that plaintiff is the beneficiary
...the policy. The statement sets the number of the policy, and
...to produce the original in court. The statement is
...made by plaintiff, states that the demand is for \$2,000 upon said

insurance policy. We are of the opinion that this meets the requirement of the statute. If defendant deemed this statement insufficient to apprise it of the nature of the claim it could have asked for a more particular statement, but any amendment amplifying the statement would not state a new cause of action. The cases cited by defendant on this point do not relate to practice in the Municipal Court.

As there are no grounds properly before us requiring us to set aside the judgment, it is affirmed.

AFFIRMED.

Investment in the United States is one of the most important factors in the economic development of the country. It is the source of the capital which is used to create new jobs and to increase the productivity of the existing ones. The amount of investment in the United States has been increasing steadily since the end of the Second World War. This is due to a number of factors, including the growth of the economy, the increase in the population, and the need for new capital to replace the worn-out equipment and buildings. The government has also played a role in encouraging investment by providing tax incentives and by guaranteeing the principal of investments in certain industries.

THE UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF ECONOMIC ANALYSIS
WASHINGTON, D. C. 20540

REPORT ON THE INVESTMENT IN THE UNITED STATES
BY THE BUREAU OF ECONOMIC ANALYSIS
FOR THE YEAR 1964

THE INVESTMENT IN THE UNITED STATES
BY THE BUREAU OF ECONOMIC ANALYSIS
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BY THE BUREAU OF ECONOMIC ANALYSIS
FOR THE YEAR 1964

THE INVESTMENT IN THE UNITED STATES
BY THE BUREAU OF ECONOMIC ANALYSIS
FOR THE YEAR 1964

455 - 24808

CITY OF CHICAGO,
Appellee,

vs.

SHERMAN SIMMONS,
Appellant.

213 I.A. 679

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Police officers of the City of Chicago, suspecting that gambling was being carried on in a pool room on South State street in Chicago, made a raid on the place. Some twenty-five or thirty men were in the room, around a pool table. Seventeen were arrested; one of them was the defendant, Simmons.

Complaint was filed, charging as to each of those arrested that on the 5th day of June, 1918, the defendant was found gambling in a pool room located at 3010 South State street, in violation of section 978 of the Revised Municipal Code of Chicago. Upon trial by the court the defendant, Simmons, was found guilty and fined \$10 and costs, from which he appeals.

The judgment must be reversed and the cause remanded, for two sufficient reasons: (1) No evidence was introduced as to the year that the alleged violation of the ordinance occurred. This was necessary in order to prove that the offense was committed within the limited statutory period. The failure to make this proof was of course an oversight, but without this evidence the judgment cannot stand. Cases supporting this view are The People v. Hood, 191 Ill. App. 33; The People v. Jackson, 178 Ill. App. 355; State v. Sauerburger, 64 Mo. App. 129; Reinert v. State, 35 Fla. 229.

076 A.I.E. 19

(2) There was an entire failure on the part of the prosecution to introduce any evidence identifying the defendant, Simmons, as having been engaged in gambling at the time. The police officer testifying, affirmed positively and with particularity his inability to identify the defendant as engaged in the violation of the ordinance. In view of this testimony the defendant should have been acquitted.

As to the point that the complaint sets forth no cause of action, it is sufficient to say that, as was held in City v. Waters, No. 24198, opinion filed January 27, 1919, if the information is not definite enough to suit the defendant he should move for a more specific one. See also City v. Baranov, 189 Ill. App. 25; City v. Williams, 254 Ill. 390; City v. Lesser, 196 Ill. App. 37.

It is suggested that the arrest was illegal, but section 342 of the Criminal Code provides that an arrest may be made without a warrant, either when a criminal offense has been committed in the presence of the officer, or where the officer has reasonable ground for believing that the person to be arrested has committed a criminal offense.

For the lack of sufficient evidence to support the judgment it is reversed and the cause is remanded.

REVERSED AND REMANDED.

(1) There was no evidence...
...to introduce any evidence identifying the defendant.
...as having been engaged in gambling at the time, the
...attorney testifying affirmatively and with positive
...is identical to the defendant as engaged in the
...of the evidence. In view of this testimony the de-
...have been overlooked.

As to the point that the complaint sets forth no
...it is sufficient to set forth the facts
...opinion dated January 27, 1935, is
...to set forth enough to set the defendant
...a more specific one. See also State v.
State v. Hill, 108 Ill. App. 2d 111, 232 Ill. App. 2d 111
State v. Hill, 108 Ill. App. 2d 111, 232 Ill. App. 2d 111
It is apparent that the error was illegal, but
...the finding made provided that on appeal any be
...a finding of a verdict, either when a finding of guilt has been
...in the presence of the officer, or when the officer
...ground for believing that the person to be ex-
...committed a criminal offense.
For the lack of sufficient evidence to support the
...it is reversed and the case is remanded.
REVEREND AND HONORABLE

456 - 24809

CITY OF CHICAGO,

Appellee,

vs.

ARTHUR JOHNSON,

Appellant.

213 I.A. 679

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Arthur Johnson, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

2181A.070

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457 - 24810

CITY OF CHICAGO,
Appellee,

vs.

FREDERICK JONES,
Appellant.

213 I.A. 680

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Frederick Jones, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

1813 A.D.

THE YEAR OF THE GREAT FLOOD

THE YEAR OF THE GREAT FLOOD

1813 A.D.

THE YEAR OF THE GREAT FLOOD

1813 A.D.

THE YEAR OF THE GREAT FLOOD

THE YEAR OF THE GREAT FLOOD

THE YEAR OF THE GREAT FLOOD

This involves a judgment against Frederick Jones,

the defendant, under the circumstances mentioned in the petition.

It is said that the defendant, Frederick Jones, is a

man of ill repute, and is a person of bad character.

It is also said that the defendant is a person of

ill repute, and is a person of bad character.

The petition of the plaintiff is also supported by

the testimony of the plaintiff and the other witnesses.

THE YEAR OF THE GREAT FLOOD

458 - 24811

CITY OF CHICAGO,
Appellee.

vs.

HARRY GARRISON,
Appellant.

213 I.A. 680

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Harry Garrison, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

088 .A.761S

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459 - 24812

CITY OF CHICAGO,

Appellee,

vs.

HENRY GOFF,

Appellant.

213 I.A. 680

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Henry Goff, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible]

083 A.7815

460 - 24813

CITY OF CHICAGO,

Appellee,

vs.

WILLIAM DURHAM,

Appellant.

213 I.A. 680

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against William Durham, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

088 A.1818

THE UNITED STATES OF AMERICA

DO hereby certify that the following is a true and correct copy of the

original as the same appears in the records of the

Department of the Interior, Bureau of Land Management, at Washington, D. C.

in accordance with the provisions of the Act of March 3, 1879, (20 Stat.

455) and the Act of October 3, 1917, (40 Stat. 1054).

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the

Department of the Interior, at Washington, D. C., this 1st day of

January, 1921.

461 - 24814

CITY OF CHICAGO,

Appellee.

vs.

EDWARD WATSON.

Appellant.

213 I.A. 680

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCGURNEY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Edward Watson, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

086 ALBIS

462 - 24815

CITY OF CHICAGO,

Appellee,

vs.

W. H. KESBY,

Appellant.

213 I.A. 681

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against W. H. Kesby, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

1881 A.D.

1881 A.D.
1881 A.D.
1881 A.D.



The following is a description of the diagram. It is a hand-drawn sketch of a large, irregular, V-shaped or U-shaped curve. The curve is drawn with a single continuous line. To the right of the curve, there are several faint, handwritten labels that appear to be '1881 A.D.' repeated multiple times, though they are difficult to read due to fading. The curve itself has some internal markings, possibly representing a path or a boundary. The overall impression is that of a rough sketch or a preliminary drawing.

463 - 24816

CITY OF CHICAGO,
Appellee.
vs.
CHARLES LA WEATHER,
Appellant.

213 I.A. 681

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MASURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Charles La Weather, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

2181A.081

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Page 1 of 1

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464 - 24817

CITY OF CHICAGO,
Appellee,

vs.

WILLIAM POWELL,
Appellant.

213 I.A. 681

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against William Powell, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24806, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

1881 A.D.

Page - 10

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465 - 24818

213 I.A. 681

CITY OF CHICAGO,

Appellee,

vs.

JOSEPH GLENN,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

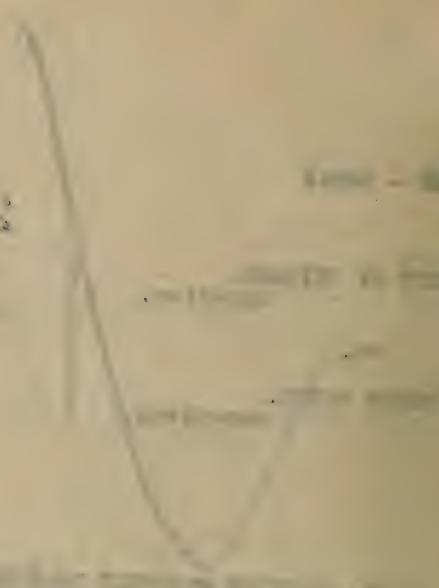
MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Joseph Glenn, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

1880 A.I.E.I.S

1880 - 1881



The following table shows the results of the experiments conducted during the year 1880-1881. The table is divided into two main sections, one for the first half of the year and one for the second half. Each section contains a list of experiments, the dates when they were conducted, and the results obtained. The results are given in terms of the amount of gas evolved, the temperature of the gas, and the color of the gas. The table is as follows:

| Experiment | Date | Results |
|------------|---------|--|
| 1 | Jan. 1 | Gas evolved 100 c.c., temperature 20°C, color colorless. |
| 2 | Jan. 5 | Gas evolved 120 c.c., temperature 22°C, color colorless. |
| 3 | Jan. 10 | Gas evolved 110 c.c., temperature 21°C, color colorless. |
| 4 | Jan. 15 | Gas evolved 130 c.c., temperature 23°C, color colorless. |
| 5 | Jan. 20 | Gas evolved 140 c.c., temperature 24°C, color colorless. |
| 6 | Jan. 25 | Gas evolved 150 c.c., temperature 25°C, color colorless. |
| 7 | Jan. 30 | Gas evolved 160 c.c., temperature 26°C, color colorless. |
| 8 | Feb. 5 | Gas evolved 170 c.c., temperature 27°C, color colorless. |
| 9 | Feb. 10 | Gas evolved 180 c.c., temperature 28°C, color colorless. |
| 10 | Feb. 15 | Gas evolved 190 c.c., temperature 29°C, color colorless. |
| 11 | Feb. 20 | Gas evolved 200 c.c., temperature 30°C, color colorless. |
| 12 | Feb. 25 | Gas evolved 210 c.c., temperature 31°C, color colorless. |
| 13 | Feb. 30 | Gas evolved 220 c.c., temperature 32°C, color colorless. |
| 14 | Mar. 5 | Gas evolved 230 c.c., temperature 33°C, color colorless. |
| 15 | Mar. 10 | Gas evolved 240 c.c., temperature 34°C, color colorless. |
| 16 | Mar. 15 | Gas evolved 250 c.c., temperature 35°C, color colorless. |
| 17 | Mar. 20 | Gas evolved 260 c.c., temperature 36°C, color colorless. |
| 18 | Mar. 25 | Gas evolved 270 c.c., temperature 37°C, color colorless. |
| 19 | Mar. 30 | Gas evolved 280 c.c., temperature 38°C, color colorless. |
| 20 | Apr. 5 | Gas evolved 290 c.c., temperature 39°C, color colorless. |
| 21 | Apr. 10 | Gas evolved 300 c.c., temperature 40°C, color colorless. |
| 22 | Apr. 15 | Gas evolved 310 c.c., temperature 41°C, color colorless. |
| 23 | Apr. 20 | Gas evolved 320 c.c., temperature 42°C, color colorless. |
| 24 | Apr. 25 | Gas evolved 330 c.c., temperature 43°C, color colorless. |
| 25 | Apr. 30 | Gas evolved 340 c.c., temperature 44°C, color colorless. |
| 26 | May 5 | Gas evolved 350 c.c., temperature 45°C, color colorless. |
| 27 | May 10 | Gas evolved 360 c.c., temperature 46°C, color colorless. |
| 28 | May 15 | Gas evolved 370 c.c., temperature 47°C, color colorless. |
| 29 | May 20 | Gas evolved 380 c.c., temperature 48°C, color colorless. |
| 30 | May 25 | Gas evolved 390 c.c., temperature 49°C, color colorless. |
| 31 | May 30 | Gas evolved 400 c.c., temperature 50°C, color colorless. |

466 - 24819

CITY OF CHICAGO,

Appellee,

vs.

WALTER LEDFORD,

Appellant.

213 I.A. 681

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Walter Leford, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

189 A.1613

189 A.1613

189 A.1613

189 A.1613

189 A.1613

189 A.1613

189 A.1613

466 - 24819

CITY OF CHICAGO, Appellee,
vs.
WALTER LEDFORD, Appellant.

213 I.A. 681

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Walter Leford, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

180 ALBIS

467 - 24820

CITY OF CHICAGO,
Appellee,
vs.
WILLIAM ANDERSON,
Appellant.

213 I.A. 682

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against William Anderson, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

220. A. R. R.

468 - 24821

CITY OF CHICAGO,
Appellee.
vs.
THOMAS WILLIAMS,
Appellant.

213 I.A. 682
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Thomas Williams, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24806, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

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469 - 24822

CITY OF CHICAGO,
Appellee,
vs.
EDWARD JACKSON,
Appellant.

213 I.A. 682

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MOSURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against Edward Jackson, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Simmons, No. 24806, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

380 A.1213

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470 - 24823

CITY OF CHICAGO.
Appellee.

vs.

DAVID JONES.
Appellant.

213 I.A. 682

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCGURELY DELIVERED THE OPINION OF THE COURT.

This involves a judgment against David Jones, the defendant, under the circumstances narrated in our opinion in City of Chicago v. Sherman Siemens, No. 24808, this day filed. What is said in that opinion is also applicable to this case; and for the failure to support the charge by evidence with reference to the date of the occurrence and the participation of the defendant in the offense charged, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

I. LURIA LUMBER COMPANY,
a corporation,
Appellant,

vs.

DAVID PREIS and H. M. ROSEN,
Appellees.

2131 A. 682

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McSURREY DELIVERED THE OPINION OF THE COURT.

In a suit brought by a sub-contractor against the original contractor and the owner, under section 28 of the Mechanics' Lien Act (chap. 82 Ill. Stat., J. & A.), upon trial by the court plaintiff had judgment for \$200. He claims that the judgment should have been for \$856.63 and interest; by this appeal he seeks to have the judgment of the trial court reversed and judgment entered here for the full amount of his claim.

The trial court seems to have been controlled in its finding by the statement in the contractor's last affidavit, rendered the owner June 6, 1916, that there was due plaintiff the sum of \$200. In our judgment this was not the controlling factor. The defendant Rosen was the general contractor for certain improvements for the defendant David Preis, the owner. In October, 1915, the plaintiff commenced the delivery of lumber for this improvement upon the order of Rosen, the contractor, and continued thereafter to make deliveries, the last of which was on June 14, 1916. There is some dispute as to this latter date, but we are of opinion it is established by the evidence. During the period of the erection of the building various payments were made by the owner to the contractor on account; some of these were made upon the sworn affidavit of the contractor, as

required by the Lien Act. These payments were made upon orders of the owner upon parties representing a mortgage loan. It appears, however, that other payments aggregating \$2,200 were made direct by the owner to the contractor, without taking an affidavit from the contractor as contemplated by the statute. We think it is sufficiently established, although somewhat disputed, that the balance due plaintiff and unpaid on the date of the last delivery of lumber was \$856.63. Plaintiff's lien notice claiming this amount was served upon the owner June 12, 1916.

Sections 5 and 32 provide in substance that any payments made to the contractor shall not be regarded as rightfully made as against any sub-contractor unless the owner has made the same upon an affidavit showing the names of all parties furnishing materials and labor, and the amounts due or to become due. In Knickerbocker Ice Co. v. Halsey Co., 262 Ill. 241, it was held that this does not contemplate only one sworn statement, but that such sworn statement must be made each time that payments are made to the original contractor. It therefore follows that the payments made by the owner, Preis, to the contractor of about \$2,200, in the absence of the contractor's affidavit, must be considered as having been wrongfully made as against the plaintiff, and must be considered in law, so far as it is concerned, as not having been made at all. American Radiator Co. v. Flakie, 165 Ill. App. 404; Mueller Lumber Co. v. Bollinger, 160 Ill. App. 402. Hence, the amount paid without the protection of the contractor's affidavits must be considered as a fund upon which plaintiff has a lien for the amount due to it. This is in accord with section 21, giving a sub-contractor a lien "on the moneys * * * due * * from the owner."

Plaintiff on February 1, 1916, executed a waiver of

...of the land and. These payments were made upon order

of the bank upon a mortgage loan. It

appears, however, that other payments aggregating \$2,100 were
made direct by the owner to the contractor, without taking an
abstract from the contractor as contemplated by the statute.

It is not clearly established, although somewhat
indicated, that the balance due plaintiff and unpaid on the date
of the last delivery of lumber was \$886.83. Plaintiff's claim
against defendant's account was served upon the owner June 12,

...and he provided in substance that any pay-

ment made to the contractor shall not be regarded as legally
valid as against the plaintiff unless the owner has been

properly notified in writing of the amount due or to become due. In

...the case of the plaintiff, it was held

that this does not contemplate only one owner, defendant, but

that from every statement must be made each time that payments

are made to the original contractor. It therefore follows that

the payments made by the owner, brother, to the contractor at about

\$2,100, in the absence of the contractor's affidavit, must be

considered as having been rightfully made on against the plain-

...and may be deducted in law, as far as it is concerned,

...and have been made of all. ...

...the ...

...the amount paid without the protection of the

...the ...

...the amount due to it. This is in accord

with section 21, giving a subcontractor a lien on the money

...from the owner.

Plaintiff on February 1, 1916, answered a motion of

lien, which it is argued is a bar to his claim. To this it may be said that the larger part of the lumber for which the lien is claimed was delivered subsequent to the date of such waiver, which is limited in its operation to the lumber delivered up to that date. A more complete answer, however, is that the waiver was limited specifically to the premises, and therefore did not operate as to the fund which we have held still remains to satisfy the claims of sub-contractors. This is in accordance with the holding in North Side Sash & Door Co. v. Goldstein, 286 Ill. 209.

As to the suggestion of defendants that no objections were made to the finding or judgment of the trial court, it is sufficient to say that the record shows a motion for a new trial, an order overruling the same, and a motion in arrest of judgment, which was overruled.

We hold that plaintiff was entitled to judgment for the amount of his claim, \$856.63. It has asked for interest on this amount as provided by statute. Section 21 provides that the sub-contractor shall have "a lien for the value thereof, with interest on such amount from the date the same is due." This would be June 12, 1916, when the mechanic's lien notice was served. Interest on the amount of the lien from this date to the date hereof, March 10, 1919, at 5 per cent would be \$117.55; adding this to \$856.63 gives \$974.18.

For the reasons above indicated the judgment of the trial court is reversed and judgment for plaintiff is entered in this court for \$974.18.

REVERSED AND JUDGMENT HERE.

... which is argued in a way to his claim. To this it
may be said that the larger part of the losses for which the
claim is claimed was delivered subsequent to the date of such
order, which is limited in its operation to the losses delivered
up to that date. A more complete answer, however, is that the
order was limited specifically to the purchases, and therefore
did not operate as to the funds which we have held still remaining
to satisfy the claims of sub-contractors. This is in accordance
with the holding in Ward v. ..., 111 Cal. 2d 100, 34 P.2d 100.

As to the suggestion of defendant that no objections
were made to the finding or judgment of the trial court, it is
sufficient to say that the record shows a motion for a new trial
was made, and a motion in arrest of judgment,
which was overruled.

It is held that plaintiff was entitled to judgment for
the amount of his claim, \$204.68. It has asked for interest
on this amount as provided by statute. Section 32 provides
that the sub-contractor shall have "a lien for the value thereof,
with interest on such amount from the date the same is due."
This will be June 18, 1916, when the mechanic's lien notice was
served. Interest on the amount of the lien from this date to
the date heretofore, March 10, 1919, at 6 per cent would be \$117.22;
adding this to \$204.68 gives \$321.90.

For the reasons above indicated the judgment of the
trial court is reversed and judgment for plaintiff is entered
in this court for \$321.90.
REVEREND AND HONORABLE JUDGE.

153 - 24073

ROBERT B. COCHRANE and LUMAN H.
COCHRANE, doing business as
COCHRANE BROKERAGE COMPANY.

Appellees.

vs.

CHICAGO GREAT WESTERN RAIL-
ROAD COMPANY, a corporation,

Appellant.

213 I.A. 683

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against the defendant to recover damages to a carload of pears, shipped by them over the defendant's railroad from Kansas City, Missouri to Marshalltown, Iowa. There was a finding and judgment in favor of plaintiffs for \$293.55.

The evidence tends to show that when the pears were loaded they were in good merchantable condition; that when the car arrived at Marshalltown they were badly decayed. On behalf of plaintiffs the evidence further tended to show that the car was not properly ventilated, and that it arrived at Marshalltown about twenty-four hours late. On behalf of the defendant the evidence tended to show that the car was a proper one in which to ship the pears; that it was properly ventilated, and that it arrived in Marshalltown on schedule time. We have carefully examined the record and cannot say that the finding for the plaintiffs was against the manifest weight of the evidence.

2181A.683

On a former appeal to this court (199 Ill. App. 469) we held that plaintiff had made a prima facie case, and that the court erred in finding for the defendant at the close of plaintiffs' evidence. During the retrial, after plaintiffs had closed their case and evidence was being introduced by the defendant, it, by leave of court and over the objection of plaintiffs, amended its affidavit of merits setting up that it was not the initial carrier, and its argument now seems to be that the initial carrier is the only one that is liable, citing Looney v. Oregon Shortline R. Co., 271 Ill. 439, unless defendant was negligent in the transportation of the pears. We think this is a correct statement of the law. Pennington v. Grand Trunk Ry. Co., 277 Ill. 239. But we have already said that the finding of the court was not against the manifest weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

234 - 24159

WILLIAM W. THOMPSON and L. G.
GROENE, copartners doing busi-
ness as WILLIAM W. THOMPSON & CO.

213 I.A. 683

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

vs.

HERMAN OTT,

Appellee.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against Herman Ott and two corporations, claiming a balance due of \$538.70 for services rendered in making a certain audit for defendants. Ott filed an affidavit of merits on September 19, 1917, in which he set up that he had a defense to the entire claim, in that he had no dealings with plaintiffs and denied that plaintiffs had done any work for him. On the same day one of the other defendants filed an affidavit of merits setting up as one of its defenses that the audit made by plaintiffs was done "in a dishonest, unbusinesslike and grossly incorrect manner," and that such services were useless and of no value. The other defendant was not served and did not appear. At the beginning of the trial, October 16, 1917, plaintiffs moved to strike the affidavit of merits filed by the defendant corporation from the files. The motion was overruled and the trial proceeded.

Plaintiffs then produced three witnesses who testified showing that they had performed services for the

defendants in making the audit in question at a stipulated compensation. The cross-examination of these witnesses developed the fact that mistakes were made in the audit, and at the close of plaintiffs' case, the court sustained defendants' motion to find the issues against plaintiffs, and judgment was entered accordingly. Before plaintiffs had introduced all of their evidence, defendants moved for leave to file amended affidavits of merits instantter which was allowed over plaintiffs' objection. The affidavits were then filed and the motion of plaintiffs to strike them from the files was denied. Afterwards the suit was dismissed as to all the defendants except Ott. His amended affidavit of merits set up the same defense as that in the affidavit of merits filed by the defendant corporation above mentioned, viz: that the services were of no value.

Plaintiffs first contend that the court erred in overruling the motion made by them to strike the defendant Ott's amended affidavit of merits, chiefly on the ground that the averment that the work was done in a dishonest, unbusinesslike and grossly incorrect manner, was a conclusion. We think this point, in the present state of the record, is immaterial, for it could in no way harm plaintiffs, since the court held that the proof adduced by them showed they were not entitled to recover.

Plaintiffs also argue that the judgment should be reversed, for the reason that even if there were mistakes made by plaintiffs in the audit, yet it was incumbent upon defendant to show that the mistakes were material, and affected the defendant to his disadvantage. If we assume that it was the duty of the defendant in the trial court to show that

the mistakes were material and the audit worthless, yet the plaintiffs in no wise point out in this court where the defendant failed in this regard. We must assume, therefore, that the trial court was correct in its finding and judgment. Counsel in their brief, in discussing this matter, say: "The testimony offered by counsel for defendant, covering these mistakes, is so voluminous that we cannot begin to quote from it. We have carefully read through all of it and found nothing in it which would warrant characterizing the audit in controversy, as worthless." Manifestly, this argument in no way points out to this court any error committed on the trial, and since it seems to be conceded that the trial judge found the issues for the defendant on the ground of plaintiffs' mistakes in making the audit, it must be presumed that the evidence showed the mistakes were material, and the burden of showing them to be otherwise, in this court, is on plaintiffs. And since they have not pointed out in any manner how the errors were immaterial, the presumption of the correctness of the trial court's finding and judgment has not been overcome, and the judgment must therefore be affirmed.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

[illegible]

260 - 24187

CARL BECKMAN,

Appellee.

vs.

WILLIAM GOETZINGER,

Appellant.

213 I.A. 683

APPEAL FROM

COUNTY COURT.

COCK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Carl Beckman brought an action in assumpsit against William Goetzinger and August Lueck to recover a balance of \$580.20, which he claimed was due from the defendants. During the trial plaintiff dismissed the suit as to Lueck. There was a verdict in plaintiff's favor against Goetzinger, and after a remittitur by plaintiff judgment was entered on the verdict for \$460.

The record discloses that William Goetzinger was a general contractor, and on March 16, 1914, entered into a written contract with St. Mark's Episcopal Church of Chicago for the construction of a church, located at 58th street and Wabash avenue. Afterwards Goetzinger entered into a written contract with the defendant August Lueck, whereby the latter was to do the carpenter work on the building. Subsequently, Lueck entered into a contract with the plaintiff whereby plaintiff agreed to construct certain stairways in the church. Plaintiff built the stairways and demanded his money from Lueck but was not paid by him, and afterwards plaintiff demanded payment

323 A. 18 13

from Goetzinger. Goetzinger agreed to pay \$460, provided plaintiff would obtain an order from Lueck authorizing such payment to be made, and provided further that plaintiff would execute a waiver of any lien he might have upon the property. Neither the order nor the waiver having been presented, payment was not made, and this suit followed.

Plaintiff's theory of the case was that there was a novation, in that it was agreed that since Goetzinger owed Lueck \$460, and Lueck in turn owed this amount to plaintiff, plaintiff should release Lueck and receive his pay from Goetzinger. There seems to have been considerable confusion on the trial as to what pleadings were required, and the law governing the case. This was brought about apparently in a considerable degree by the argument and controversy of the lawyers across the table, which of course is always improper, and is seldom of any assistance to the court in the correct solution of the controversy. We say this for the reason that there must be a retrial of the case, not on this account but for other errors, and that it may be obviated on such retrial.

Plaintiff to establish the novation testified that he had a conversation with Lueck out of the presence of Goetzinger, in which Lueck stated that he had an arrangement with Goetzinger whereby Goetzinger was to pay plaintiff. This testimony was objected to and the objection properly sustained on the ground that Goetzinger was not present at the time, but upon cross-examination counsel for defendant brought out this testimony. There was, however, no evidence offered that plaintiff released Lueck and agreed to look solely to Goetzinger for his money. It therefore clearly appears that plain-

tiff did not sustain by evidence his claim of novation. Goetzinger testified that he had agreed to pay the \$400 to plaintiff on condition that plaintiff would obtain an order from Lueck authorizing him to make such payment, and on the further condition that plaintiff would execute a waiver of any lien that he might have on the church property. On the other hand plaintiff testified that there was no condition that he should obtain an order authorizing such payment, but that the only condition was that he execute and deliver to Goetzinger a waiver of his lien, which he admits he refused to do, so that it appears that plaintiff failed in at least one of the conditions imposed by Goetzinger. Manifestly, on this phase of the case plaintiff has failed.

Considerable was said on the trial and in the briefs that Goetzinger's promise, if any, was within the statute of frauds, and therefore it was necessary that the promise should be evidenced by some memorandum in writing; but if plaintiff's theory of the case is correct, the statute of frauds was in no way applicable, and he could recover under the common counts. Runde v. Runde, 59 Ill. 98. Lueck was not produced as a witness, and his absence was in no way accounted for. Plaintiff having failed to establish his case, the judgment is reversed and the cause will be remanded for a new trial, and since there must be a retrial, we refrain from further discussing the testimony.

The judgment of the County Court of Cook County is reversed and the cause remanded.

274 - 24201

ELIZABETH JOHNSON,

Appellee.

vs.

CITY OF CHICAGO, ET AL.

Appellants.

2131.A. 683

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the City of Chicago and others to recover for personal injuries. There was a verdict in her favor for \$375 on which judgment was entered, from which the defendant City of Chicago prosecutes this appeal. The other defendants were dismissed out of the case.

The record disclosed that at the time of the injury plaintiff was about seventeen years old; that she and a companion were walking along the sidewalk on Blue Island avenue, when she fell into an opening in the sidewalk which leads into a basement, and received the injuries for which the suit is brought. The opening in the sidewalk was covered by two iron doors which came together in the middle and formed a part of the sidewalk. The doors were fastened to the sidewalk by means of hinges. A witness testified that these hinges had been in bad state of repair for about two months prior to the accident, which occurred September 29, 1912, at about 8 o'clock P.M. The evidence further shows that there were a number of men standing near the opening in the sidewalk and plaintiff, to pass around them, walked into the

Casey - 475

889 A.18.19

opening and fell into the basement.

Defendant contends that the testimony in reference to the condition of the hinges and doors prior to the accident should have been stricken out on its motion for the reason that the charge in plaintiff's statement of claim was that the defendant permitted the doors to remain open and unguarded, and that the testimony of plaintiff showed that she stepped into the opening in the sidewalk, and therefore there was no allegation which would warrant the admission of evidence as to the condition of the doors prior to the accident. The argument seems to be that there was no causal connection between the condition of the doors and the accident, but that the evidence shows that plaintiff received the injuries complained of solely by reason of the doors being open. With this contention we cannot concur. The statement of claim in addition to averring that the defendant negligently permitted the doorway and opening in the sidewalk to remain open and unguarded, further averred that the doors and opening were in an unsafe and dangerous condition. And there was evidence that at the time plaintiff was injured one of the doors was hanging down into the opening, which would indicate that the doors were not open, but by reason of the defect in the hinges and other parts, it hung down into the opening. We think the statement of claim was sufficient to warrant the admission of the evidence as to the condition of the doors prior to the accident, and the court did not err in refusing to strike out the testimony on defendant's motion.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

233 - 24210

HENRY JERNS,

Appellee,

vs.

JOHN SCHROEDER,

Appellant.

213 I.A. 683

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

MR. PRESIDING JUDGE O'CONNOR delivered the opinion of the court.

On October 20, 1917, Henry Jerms brought an action of attachment against Carl Schroeder and John Schroeder, claiming a balance due him of \$196.30, upon an open account for milk sold and delivered to the defendants at their special instance and request. The grounds for attachment were that the defendants had, within two years last past, (1) fraudulently conveyed or assigned their property; and (2) fraudulently concealed and disposed of their property so as to hinder and delay their creditors. The writ was served on the defendant John Schroeder, Frank Brovitz and the National Milk Company were served as garnishees. Afterwards, on motion of the plaintiff, the suit was dismissed as to Carl Schroeder. The National Milk Company answered that it was conditionally indebted to the defendant John Schroeder in the sum of \$250; that it had purchased from him "a certain portion of the business formerly conducted by defendant for \$450"; that it had paid cash \$200 and had retained \$250 to secure it against any claims that might be made by creditors. Afterwards, the plaintiff

filed an amended affidavit for attachment against the defendant John Schroeder alone, claiming \$236.34. The defendant filed an affidavit of merits and traversed the grounds for attachment. He denied any indebtedness and set up the nature of his defense. The case was tried before the court without a jury; the issues as to the attachment and the merits were both found against the defendant, and plaintiff's damages were assessed at \$196.40. Judgment was also entered on the garnishee's answer in the usual form.

The record discloses that the defendant was engaged in the milk business in Chicago and plaintiff, a dairyman, had furnished the defendant milk continuously for 14 years; that in 1913 the defendant sold out the business to his son Carl Schroeder who was made a defendant when the suit was commenced; that in payment of the business Carl executed a judgment note to his father for \$1150; that thereafter Carl Schroeder and his wife conducted the business for about three years; that on January 1, 1917, the son left home and his wife requested her father-in-law, the defendant, to come to Chicago from the country, where the latter had been employed for several months, and assist her in conducting the milk business. The defendant came to Chicago and assisted his daughter-in-law in the conduct of the business until March 20, 1917, when he took the business over from his son and daughter-in-law and, from that time, conducted the business himself until the fore part of October. He then sold it out to the garnishee, the National Milk Company.

Plaintiff's claim is for milk delivered during the months of January, February and March, 1917 and it is his theory that, during all the time the son Carl conducted the

business he was merely acting as the agent of his father. The defendant's theory was that he had no connection with the business from the time he sold it to his son in 1913 until he again took charge of the matter on March 20, 1917 and, therefore, any indebtedness due to plaintiff was an indebtedness of the son Carl.

It is admitted by the plaintiff that he had sold milk for 14 years continuously to the defendant and that all of the bills were paid and it is further conceded that, from March 20, 1917, until the defendant sold out the business, all bills were paid except for a few cans of milk which were delivered the first few days in October and which was not due under the contract until the 10th of the following November; therefore, not due at the time the suit was commenced.

Plaintiff further contends that, after January 1, 1917, he demanded payment of the defendant on three different occasions and each time the defendant promised to pay and that this promise was good for the reason that the business when conducted by Carl, was the business of the defendant.

We have considered very carefully all of the evidence in the record and are of the opinion that the finding is against the manifest weight of the evidence. The testimony, when considered with attention, shows that the business was Carl's for about three years and during the time the indebtedness involved in this suit was incurred; that the father had no connection with it and that his promise to pay the plaintiff was conditioned on his ability to collect for the milk already sold. Plaintiff, himself, testified on direct examination:

"Q. And you entered into that contract in the last few years with Carl Schroeder? A. Yes, he bought the milk.
Q. And for the milk delivered in January, February and March, 1917, you had an agreement with Carl Schroeder, as I understand it? A. Yes sir." He further testified that when he demanded payment of the defendant the defendant said: "I will collect the money and pay for the milk myself." And on demand for payment, the plaintiff further testified that the defendant said: "He said he tried to collect the money for January and pay all up but he couldn't. He said, 'I have collected \$100 and I will give you that now and the rest I will give you in a week or two', but he never showed up again." Plaintiff also testified that on the first of March when he again demanded payment he told the defendant that he would quit furnishing him milk on the 1st of April and that the defendant requested him not to quit and said: "You keep on shipping, I will collect and pay you."

On March 20, 1917, plaintiff demanded a written contract from the defendant for the sale of milk for six months, and on cross-examination when asked why he had demanded this written contract if he all the time considered the defendant owner of the business, replied: "I figured that he was out of the business three years prior to the signing of the contract." The witness Eatten, who was a farmer and had also sold milk to the defendant, testified that he was present at two conversations between plaintiff and defendant and that defendant agreed on both occasions to pay plaintiff. He further testified that he delivered milk to the son Carl during the time Carl was running the

[illegible]

business and that his contract for the delivery of milk was with Carl. A. C. Benhart, also a witness for plaintiff, testified that he was present on one occasion when plaintiff demanded payment of the defendant and that defendant agreed to pay when he collected the money. From this it will be seen that the testimony of plaintiff's own witnesses shows that the business was owned and conducted by the son Carl, and that defendant's promises to pay plaintiff was conditioned upon his being able to collect outstanding money due to Carl. In addition to this defendant testified positively that the business belonged to Carl and that he never at any time promised to pay Carl's debts.

We think it clear that the plaintiff did not prove that the defendant was indebted to him and that the business when conducted by the son Carl was the father's business, but we think the evidence does show that the business belonged to the son and was conducted by him, and that the defendant is not indebted to the plaintiff. It, therefore, is unnecessary for us to consider the questions of law discussed by the parties. The only claim that plaintiff seems to have is for the eight cans of milk delivered to the defendant during the first few days of October, 1917, the price of which was not due at the time suit was begun.

The judgment of the Municipal Court of Chicago is therefore reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as ultimate facts that defendant sold his milk business to his son Carl in 1913; that Carl was the

[illegible][illegible]

owner of the business from 1913 until April 1st, 1917; that defendant's promise to pay plaintiff was conditioned upon his collection of money due to Earl, and that defendant never made any absolute promise to pay his son's debts owing to plaintiff.

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONERS OF THE
UNIVERSITY OF CHICAGO
FOR THE YEAR 1900
PUBLISHED BY THE
UNIVERSITY OF CHICAGO
PRESS

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24233
300 - 24233

CHICAGO PIPE COMPANY.
a corporation.

Appellee.

vs.

NATHAN ROSENTHAL.

Appellant.

213 I.A. 684

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 29, 1917, plaintiff brought suit against the defendant and filed its statement of claim, which is in substance as follows: "For goods, wares and merchandise sold and delivered by said plaintiff to said defendant, at the special instances and requests of said defendant, in the nature of pipe and fittings and plumbers supplies, as follows, to-wit:

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|------------------------|---------|----------|---|
| 1917 | | | |
| July 26th. | \$39.48 | | |
| July 27th. | 204.13 | | |
| July 30th. | 26.63 | \$321.23 | |
| Aug. 2nd. | 212.50 | | |
| 7th. | 18.21 | | |
| 8th. | 65.63 | | |
| 9th. | 16.75 | | |
| 10th. | 16.76 | | |
| 15th. | 4.33 | | |
| 17th. | 6.75 | | |
| 21st. | 8.29 | | |
| 23rd. | 18.69 | | |
| 24th. | 3.47 | 376.56 | |
| Sep. 11th | 14.46 | 14.46 | |
| | | \$706.27 | |
| | | 3.24 | |
| Aug. 23rd Credit Memo. | | \$703.03 | " |

The affidavit attached to the complainant's claim contains the following: "that the said cause is a suit upon

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contract for the payment of money; that the nature of plaintiff's demand is as stated, and that there is due the plaintiff from the defendant after allowing the defendant all his just credits and deductions and set-offs the sum of seven hundred and two dollars and thirty-three cents (\$702.33)"

The defendant was duly served with summons on October 30, 1917. On November 5, 1917, the default of the defendant was duly entered and on the same day judgment entered in favor of the plaintiff and against the defendant in the sum of \$702.33 together with costs. From that judgment this appeal is taken.

It is the contention of the defendant that the statement of claim and affidavit attached thereto are defective; that the statement of claim "fails to recite as to whether the purchase was made on the contracts for specific amounts or whether the amount shown was the reasonable value of the merchandise at the times of deliveries which was agreed upon by the parties to be paid therefor." We can not agree with the contention of the defendant.

The statement of claim states that it is for goods, wares and merchandise sold and delivered, also that they were sold and delivered at the special instance and request of the defendant, and that the goods, wares and merchandise sold and delivered were in the nature of pipes and fittings and plumbers supplies. It then further sets up the times of deliveries and the amounts charged in dollars and cents, and the affidavit attached thereto, recites that the cause is a suit upon contract for the payment of money; that the nature of plaintiff's demand is as stated and that there is due to the plaintiff from the defendant, after allowing to the defendant all his

just credits, the sum of \$708.33.

The reasonable inference from the statement of claim is that, for example; on July 28, 1917, the defendant bought from the plaintiff goods, wares and merchandise, in the nature of pipe and fittings and plumbers supplies, of the accredited value of \$30.45. The same inference may be made concerning each of the other items. Certainly the statement of claim together with the affidavit fully informed the defendant concerning the claim of the plaintiff, and as it is legally complete, we are of the opinion that it was sufficient to base the judgment upon.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

322 - 24249

SAMUEL T. JACOBS,

Appellee,

v.

EMPLOYERS INDEMNITY
EXCHANGE, a corp.,

Appellant.

213 I.A. 684

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, S. T. Jacobs, having a policy of insurance issued by the defendant, the Employers Indemnity Exchange, insuring him as to any damages resulting from his automobile colliding with any stationary object, and his automobile having been injured by colliding, as he alleged, with a certain embankment, brought suit against the defendant and recovered a verdict and judgment in the sum of \$556.85.

On the evening of August 14, 1916, between 8:00 and 9:00 o'clock, after dark, one Dana Jacobs - son of the plaintiff - was driving a Cadillac automobile from some point in Glen Ellyn towards Lombard on a public thoroughfare known as Crescent Road. Sitting with him in front was Olin Dibble and in the rear seat of the machine was David Dibble and his wife. Dana Jacobs, the driver, was at that time about twenty years of age and the car belonged to his father, the plaintiff, S. T. Jacobs. When the automobile had been driven about three-quarters of a mile it

was passed by another automobile and immediately afterwards the left wheels of the automobile driven by Dana Jacobs went over the north side of the macadamized road and in that position ran along about forty feet. The driver brought the machine back on the roadway and it then went across the roadway at an angle of about forty-five degrees and either ran into the embankment, which was on the south side of the roadway, or, else, just after crossing over the roadway to the south, it was upset, without striking the embankment, and from some other cause.

It is the theory of the plaintiff that the automobile xxx damaged by reason of colliding with the embankment, and whereas, it is the theory of the defendant that the automobile was upset without any collision of any kind. According to the terms of the policy if the damages suffered by the automobile were caused merely by an "upset" and not by a collision there would be no liability.

The evidence of the witness David Dibble, who was the only witness who testified to seeing what actually transpired is to the effect that on the left or north side of the road there is a declivity and on the right or south side of the road an embankment four or five feet high; that after the other car had passed them and they were in the dust of that machine, it was hard to see the road; that the north wheels of the automobile went over the north side of the road; that then it swung back on and over the road at an angle of about forty-five degrees; that "all of a sudden

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it came up and went right across the road into this bank that is too high - I remember as we hit the bank it threw us out"; that the automobile collided with the bank; that it threw him out. As a result of the accident the driver, Hans Jacobs, had his skull fractured and became unconscious and remained so for several days thereafter, and subsequently was unable to recall any of the circumstances.

Bibble further testified, on cross examination, "I am sure of the fact when we came up from the road and went into the bank and after that I do not remember because it threw us out;" and further, "Yes, the car struck the embankment; the only thing I would say it hit would be the whole front of the car, that is the right fender and the wheel." Immediately after the accident his wife, who had been sitting on the rear seat with him, was partly in the automobile and partly on the fender, her head having gone through the canvas top and two of the ribs of the frame work held her around the waist so that she was seemingly suspended in midair. Hans Jacobs immediately after the accident was found lying in the middle of the road.

The evidence of Mrs. E. W. Somerville is to the effect that she was riding in an automobile driven by her husband, with her mother and a Mrs. Newton; that they passed a Cadillac car on the road to Glen Ellyn; that they were going 18 miles an hour; that it was dark; that she heard a horn blow behind her; that she spoke to her husband; that he pulled to one side of the road to allow the other car to pass; that she then looked back and saw a pair of head lights through the dust made by the machine she was in; that first they were on the north side of the road and then they shot across to the south

I came up and went riding around the road into this park
that is the sign - I remember as we sat the horse in front
of us; that the automobile collided with the horse and
it threw him off. As a result of the accident the driver,
John Smith, and his wife, Margaret, were injured.
John and Margaret, as they returned from the hospital, and
subsequently the driver to hospital, one of the drivers.

WITNESS STATEMENT, J. H. SMITH, JR.

I am one of the witnesses who saw the accident on the
road. The horse and rider that I do not remember because of
being so close, and I think, "Yes, the car struck the horse
and he was thrown off. I would say it was about the middle
of the road, that is the right corner and the road.
Immediately after the accident the car and horse were
left on the road with him, was partly in the automobile
and partly on the ground. The horse was thrown through the
ground and two of the ribs of the horse were said to
be broken. The witness at that time was standing in front of
him. The horse immediately after the accident, was found
lying in the middle of the road.

The witness at Mrs. W. B. Smithville is to the

effect that she was riding in an automobile when it
collided with the horse and a man. I remember that they
passed a building on the road to the right that
was about 100 feet long and that it was about 100 feet
wide. The horse was thrown off and the driver was
killed. The witness at that time was standing in front of
him. The horse immediately after the accident, was found
lying in the middle of the road.

side of the road; that the lights turned a complete circle; that she saw both lights all the time; that they remained in the road in a northeasterly direction; that her husband drove on and when he was told there was an accident he went back; that after the accident the lights were pointing in a northeast direction; that the lights described a circle; that when they passed the machine they were going 18 miles an hour; that after they passed it they increased their speed so as not to annoy them with their dust; that they went about three-quarters of a mile past the machine before she saw the lights go around in a circle; that when she first looked back and saw the headlights after she passed them they were about 200 yards back; that it was dark; that the lights went around in a circle after the car left the north side of the road and shot across to the south side of the road; that it ran to the south side of the road; that the circle of the lights was continuous.

The evidence of Fanny R. Newton is to the effect that she was riding in Dr. Somerville's car, sitting in the back seat on the right hand side; that they passed a car inside the village limits; that she heard the toot of a horn behind her; that she turned and looked and saw the headlights on the machine; that they were on the extreme north side of the road; that "it immediately started to plunge across to the south side of the road in a diagonal line"; that she then saw what seemed to be a circle of light; that the lights were pointed slightly north when they made a complete circle; that the circle of light occurred after the machine went across the road. The evidence of Thomas E. Somerville is to the effect that the next day he went down to see the car; that he saw the

track of the wheels on the north edge of the road; that there is quite a precipice there; that a car wheel probably would be about a foot down in the greatest depression from the level of the road; that the depression ran for about 40 feet; that the track then took a turn to the south across the road; that the grass was quite long south of the road; that between the roadway and the embankment he saw marks as though a wheel had been turned to go straight east and it had thrown the grass out like a screw; that the rut made by the wheel was from 6 to 8 inches; that the rut or mark on the south side of the road was ten or twelve feet long; that the embankment was 4 or 5 feet from the macadamized road; that there was shrubbery on the embankment; that none of the shrubbery was broken down; that the embankment did not look as though it had been struck; that he is a clergyman; that the roadway was about 10 or 12 feet wide; that the noses of the front fenders were smashed. The evidence of J. Lester Williams, the attorney for the defendant, is to the effect that he went out with Mr. Jacobs; that the right front fender was crushed down against the side of the body of the wheel and the left front fender also crushed down; the right running board was smashed, the right rear fender was crushed down over the right rear wheel and the top of the automobile smashed down on the bottom and broken loose from the right front corner; that the body of the car was smashed and pushed to the left of the car; that the engine was apparently all right; that the glass of the headlights was shattered, the top part of the body was scratched and smashed; that he saw the place where the wheel had gone off the crest of the road, that is the main roadway; that there is a

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a blanket, wrapping around me and filling my lungs. The sun was shining brightly, casting long shadows on the ground. I took a deep breath, savoring the fresh air. The world around me seemed so peaceful, so quiet. I had never felt like this before. It was a strange feeling, but I liked it. I looked up at the sky, watching the clouds drift lazily across. The birds were singing, their voices filling the air. I felt like I was part of something beautiful, something I had never experienced before.

steep incline from 6 to 8 inches from the edge of the stone roadway; that off the edge of the road there was a clearly defined print of an automobile wheel; that it was in depth in places 7 or $7\frac{1}{2}$ inches deep; that it ran for about 60 feet; that the track then emerged to the roadbed and ran at an angle of 45° , running about 52 feet diagonally across the road; that then and there was an imprint of a wheel south of the main roadbed for a distance of 60 feet running parallel with the road; that the rut there varied from 18 to 16 inches at once place in width; that the nearest it came to the embankment on the south side of the road was a foot and a half; that where the rut ended on the south side of the road the ground was badly torn up; that there was glass lying on the macadamized road on the north of the center of the road; that at the east end of the rut on the south side the hard roadbed was abraded; that he saw no marks of any kind or character on the embankment; that the embankment is about 4 to 5 feet above the level of the grass plot which lies between the main roadbed and the embankment; that the roadbed is 25 feet wide; that the distance from the roadbed to the embankment varies from 4 to 6 feet. Dana S. Jacobs, for the plaintiff, testified that he is the son of S. T. Jacobs, 21 years old, living with his father in Glen Ellyn; that his father only had one car, which is a Cadillac and had no other at the time of the accident; that he, himself, was in the hospital for a week; that he was unconscious for several days after the accident and could not recollect anything; that he can not now recall anything later than the Saturday before the accident; that his father is now

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at the time of the trial in the hospital.

The cause was tried before a jury and a verdict returned in favor of the plaintiff in the sum of \$555.85. Judgment was entered for that amount; and this appeal taken therefrom.

The defendant makes two contentions: First, that the plaintiff did not prove that the automobile which was damaged was the same automobile as that which was covered by the policy of insurance. Second, that the damage to the automobile in question was caused by an upset and not by a collision.

As to the identification of the automobile, we are of the opinion that the evidence was sufficient; it shows that the Cadillac automobile was the only one which the plaintiff owned, and, further, that Williams, the claim agent of the defendant, went out and examined the damaged machine and testified in detail in regard to its condition, and also that he told the plaintiff immediately afterwards that "Because of the fact that he could not establish the fact that they had hit something, that there had been an actual collision, that he would not be covered under his policy." Also other evidence exists in a letter dated August 24, 1916, sent from Kansas City, Mo. by a representative of the defendant, some of the language used therein being as follows: "The damage to your automobile of course is not covered under the collision contract," etc. Considering all the evidence in the record pertaining to the automobile covered by the policy brought suit upon, we are of the opinion that the proof of identification was sufficient.

As to the second contention, which involves the question, was the jury justified in finding that the damages to the automobile were caused by a collision, we are of the opinion that the direct evidence of Bibble as to how the accident happened was sufficient, notwithstanding the evidence of other witnesses as to conflicting circumstances. His evidence is definite and explicit and to the effect that the plaintiff's automobile, after crossing the road to the southeast, struck the embankment. Of course, if the automobile upset as a result of striking an embankment it follows that the liability of the defendant under the policy was established. The testimony of Mrs. Somerville and Fanny R. Newton as to what they saw, when looking back from the automobile in which they were riding, is not necessarily inconsistent with the testimony of Bibble that the automobile collided with the embankment. It is true, however, that the testimony of Thomas E. Somerville and E. Lester Williams, one of the attorneys for the defendant, as to what they discovered in the way of wheel tracks and other marks the day after the accident conflict somewhat with the testimony of Bibble, but, inasmuch as the evidence was presented to the jury, and they have by their verdict shown that they believed that the automobile collided with the embankment, we are not now justified with the record before us as it is, in arriving at the conclusion that the verdict is against the manifest weight of the evidence. On the other hand we feel convinced that, considering all the circumstances, the jury were amply justified in rendering the verdict they did.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

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277 - 23622

SIDNEY C. EASTMAN, Trustee.

Appellee.

v.

GEORGE S. DOLE, ET AL

SHELDON DOLE LEHAN, FRANCES
M. LEHAN (FIDELINE) and HENRY
W. LEHAN, Executors of the last
will of FRANCES S. DOLE LEHAN,
Deceased.

Appellants.

213 I.A. 684

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of
the court.

In this suit the appellee, Sidney C. Eastman, trustee under the last will and testament of James H. Dole, deceased, filed his bill of complaint, making the heirs at law and legatees of the deceased, parties defendant, seeking the approval and settlement of his accounts as trustee and praying to be relieved of the trust and to be permitted to resign as trustee. From a decree entered for the complainant, granting the relief prayed for in the bill, certain of the defendants have appealed.

James H. Dole died February 16, 1902. So far as it is necessary to state them, for the purposes of this opinion, the provisions of his will were as follows:

There was a specific legacy of \$5,000.00 to Mary L. Dole, a daughter and another of \$1.00 to Charles E. Dole, a son. All the remainder of the estate, was devised and

483 A.16.13

bequeathed to Sidney C. Eastman in trust,

"The same to be held, managed, and controlled by my said trustee, in the discretion of my said trustee for the best advantage of my said estate, and for the proper preservation thereof, and after the payment of all fixed charges upon said trust estate, and also all expenses of said trust, including a reasonable fee and allowance to my said trustee for his services in that behalf, and after reserving from the income of my business, as long as it is conducted as hereinafter provided, an amount sufficient in the discretion of my said trustee to furnish the necessary working capital for said business, or for any other purpose in connection with said business, which, in the opinion of my said trustee, may be necessary, I direct that the balance of said income, or so much thereof as shall in the discretion of my said trustee be deemed necessary, be first applied towards the payment of the household and living expenses of my said wife, Sarah F. Dole, and my sister Julia F. Dole, and my daughter Mary L. Dole, and the survivors of them, during the life of my wife Sarah F. Dole. And during the life of my said wife, Sarah F. Dole, so much of the balance of said net income thereafter arising as may be deemed necessary by my trustee, I authorize my trustee to pay to my wife, Sarah F. Dole, for her personal use only, and any balance of income arising in excess of the payments herein provided, or any other sums arising in the conduct of the business of said trust estate, not otherwise appropriated by the provisions of this will, my said trustee in his discretion shall add to the principal of my said trust estate hereby created.

Upon the death of my said wife, Sarah F. Dole, I direct that my said trustee herein named pay the net annual income thereafter arising from my said trust estate to the following children, if they are living at the date of my decease, Francis E. Leman, wife of Henry W. Leman, George S. Dole, Mary L. Dole and Julia E. Hurlbut, wife of Horace E. Hurlbut, share and share alike, and in the event of the death of any of my above named children, either before the date of my death or otherwise, leaving no child or children then surviving, then I direct that the share of the net annual income that would go to said deceased child or children above named, if living, shall be paid to the survivors of my above named children in equal portions, and in the event of any of my above named children dying and leaving children living, then I direct that the share of the income of my said trust estate, which would have been paid by my said trustee to such deceased child or children, if living, under the terms of this will, shall be paid by my trustee to the children of my said deceased child or children, if any, in proportion to and according to the laws of descent of the State of Illinois. * * *

Inasmuch as a large part of my estate consists of elevators, warehouses, grain stations, and the like,

in the State of Illinois, and also of a commission business carried on by me for many years in the City of Chicago, Illinois it is my desire that the same be continued by my said trustee, so long as in the opinion of my said trustee and of my wife Sarah F. Dole, and of my son George S. Dole, or the survivor of them, it is deemed for the best interests of my trust estate so to do, and inasmuch as it is necessary from time to time for my business house in Chicago to accept time and sight drafts from business customers, and to borrow money and to incur other obligations, necessary for the transaction of said business, I hereby authorize my said trustee to accept said drafts and assume said business obligations, and to borrow said money, on behalf of my said business, as it may become necessary in the transaction of my said business, and I hereby make such obligations a first charge and lien upon the property of said trust estate. * * * and it is my wish that so long as said trustee shall conduct my said commission business, he employ my son George S. Dole, and Charles E. Armstrong to attend to the details thereof, upon such terms of employment as shall be satisfactory to my said trustee on the one part, and the said George S. Dole and Charles E. Armstrong on the other part. * * * and said trustee is hereby empowered at any time to change the character of my said trust estate, or any part thereof, and to reinvest the proceeds thereof, and such reinvestment shall constitute a part of the principal of my said trust estate. * * *

I request that in the transaction of the business affairs of my said estate, my said trustee shall defer to and be largely guided by the wishes of my wife, Sarah F. Dole, and my son, George S. Dole, or the survivor of them, in the exercise of his discretion in the management of my said trust estate."

The testator left surviving him, his wife, Sarah F. Dole, two sons, George S. Dole and Charles E. Dole and three daughters, Frances E. Dole Leman, wife of Henry W. Leman, Julia E. Dole Hurlbut, wife of Horace E. Hurlbut and Mary L. Dole. The testator's daughter Mary L. Dole, died in December, 1907 and his widow died in June 1909. This bill was filed in July 1911, naming as parties defendant the testator's two sons and his two surviving daughters and also the two children of Mrs. Leman, Sheldon Dole Leman and Frances Leman Perkins. George S. Dole and Mrs. Hurlbut answered the bill admitting the correctness of the trustee's accounts and consenting to his being relieved of his trust. Charles E. Dole

and Sheldon Dole Leman defaulted. Mrs. Leman and Mrs. Perkins answered the bill raising numerous objections to the trustee's accounts, and they also filed a cross bill praying that he be removed as trustee. Later the trustee filed an amended bill, adding as parties defendant, the wife of George S. Dole, the two children of Charles E. Dole and also Henry W. Leman, husband of Mrs. Leman. By another amendment J. H. Dole & Company, a corporation, was made a party defendant. There were other pleadings which are not material and need not be noted here. In October 1915, Mrs. Leman died and in January, 1916 the complainant filed a bill in the nature of a bill of revivor, bringing his accounts down to date, and naming the same parties as defendants except that Henry W. Leman, as executor of his wife's estate, was substituted for her as a party. The case was referred to a Master and many hearings were had after which the Master made his report and the objections and exceptions filed to it were overruled and the decree appealed from followed. The appellants are Henry W. Leman, as executor of the last will and testament of Frances E. Dole Leman, deceased, Sheldon Dole Leman and Frances Leman Perkins.

James H. Dole, the testator, had for many years been a grain commission merchant, doing an extensive and successful business, under the name of James H. Dole & Company. He was a member of the Board of Trade of Chicago and much of his business was conducted on and through the Board. He also owned a large number of grain elevators throughout the State of Illinois.

Mr. Eastman and Mr. Leman had been close friends for many years. Mr. Eastman, after the death of the testator,

and the fact that the same person was the only person who was able to get into the building and take the money out of the safe. The fact that the same person was the only person who was able to get into the building and take the money out of the safe is a strong indication that the person who was able to get into the building and take the money out of the safe is the same person who was the only person who was able to get into the building and take the money out of the safe.

duly qualified as executor of the estate and as trustee under the provisions of the will and Mr. Leman acted as attorney for the estate and when occasion arose, was consulted by Mr. Eastman as trustee and acted as his counsel.

Mr. Eastman continued the business of J. H. Dole & Company as requested by the testator in his will. Some weeks after the testator's death he was advised by the officials of the Board of Trade that under their rules he could not be permitted to conduct a business on or through the Board as a trustee. He was further informed by the attorney for the Board that the only way in which he would be permitted to carry on the business of the testator would be through a corporation. Thereupon the matter was taken up by the trustee with the testator's widow, Sarah F. Dole, his son George S. Dole and Mr. Leman. All the parties in interest were of the opinion that the business should be continued and that the position taken by the officials of the Board of Trade should be complied with and their suggestion adopted and they united in written communications to the trustee expressing their desire that the business be incorporated and this was done, the details being attended to by Mr. Leman as counsel for the trustee.

The capital stock was fixed at \$150,000, divided into 1500 shares of \$100 each, of which 1496 were taken by Mr. Eastman, as trustee, 1 by Mr. Sager who was actively connected with the management of the business and 1 each by Mr. Leman, George S. Dole and Mr. Harbut. Mr. Leman rendered the corporation a bill for his services in connection with the organization and it was paid. From that time until 1908 he continued

as an officer and director of the company and acted as its attorney in many matters.

It is now contended by the appellants that the investment of the funds of the trust estate, procured in part by the sale of securities it held, in the stock of this corporation J. H. Dole & Company was without authority in law or justification under the terms of the will. In support of this contention many cases are cited, holding that the investment of the funds of a trust estate in the stocks or securities of a corporation engaged as this corporation was, or in any other hazardous business, is improper and illegal. None of them are in point or have to do with any such situation as is involved in the case at bar. Under all the provisions of the will of the testator, the course pursued by the trustee in this matter was entirely proper. Moreover, so far as the appellant Henry W. Leman, as executor, is concerned, he is estopped to complain of this action of the trustee. With a full knowledge of the situation and all their rights in the premises, the organization of this corporation was specifically agreed to and authorized in writing both by him and his wife.

It is argued by appellants that the testator requested that his business be carried on "by my trustee", thus confiding it to the discretion of the trustee and not to a corporation, with a number of directors, of whom the trustee is only one. But the will also stated, "I request that in the transaction of the business affairs of my said estate, my said trustee shall defer to and be largely guided by the wishes of my wife, Sarah F. Dole, and my son George E. Dole, or the survivor of them, in the exercise of his discretion in the

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management of my said trust estate." As soon as the trustee was advised of the stand taken by the officials of the Board of Trade he conferred with Sarah F. Dole and George S. Dole and Mr. Leman himself, incorporating the facts in a joint letter to them and they in a written reply expressly authorized the formation of the corporation and upon its organization, George S. Dole, Horace E. Marlbut, Hiram N. Sager, Henry W. Leman and Sidney C. Mastman became its directors. George S. Dole became president of the company and has continued as such down to the present time. The Master's finding that the corporation J. H. Dole & Company was "the instrumentality through which the trustee carried on the commission business," was proper under the evidence and the overruling of the appellant's objections and exceptions to that finding was not error.

Appellants complain of certain transactions between J. H. Dole & Company and George S. Dole. The evidence shows that for some time previous to the testator's death George S. Dole had been in the habit of buying grain from the farmers and shipping it to his father for sale on commission. He would draw drafts on his father to pay for the grain and the books always showed an indebtedness existing, from the son to his father. On the latter's death this indebtedness amounted to about \$20,000 which had been reduced to about \$16,000 at the date of the trustee's last accounts, by income derived from the estate by George S. Dole and which was not paid to him but was credited against his indebtedness to the company, under an assignment he had executed for that purpose. His indebtedness was further secured by cer-

tain life and accident insurance policies. In our opinion the actions of the trustee in these matters were not improper in view of all the circumstances and the provisions of the will, with regard to George E. Hale and his connection with the business and the management of the estate.

The Master ruled that "the account presented by the person accounting is taken as prima facie true and, when objections are made thereto, the objector assumes to prove the facts necessary to sustain his objections and has the burden of proof," and he found that "in this case the objectors have not made such proof." Appropriate objections were made and exceptions taken to this ruling and finding by the Master, which the Chancellor overruled, which ruling is assigned as error. The ruling of the Master complained of was not strictly correct. It confused two separate subject-matters namely, what is necessary to make out a prima facie case by a person accounting as trustee, and who has the burden of proof as between such a person and an objecting cestui que trust. As to the latter question, the law is that the burden is not upon the beneficiary of the trust to establish that items objected to are incorrect or improper but rather upon the trustee to establish that they are correct and proper. 39 Cyc. 476; Luman v. Rothbarth, 139 Ill. 270, 280; The State v. Ill. Cent. R. R. Co., 246 Ill. 133, 240; Wylie v. Bushnell, 277 Ill. 484, 506, 511. This rule is in no way inconsistent with the proposition that where a complainant trustee who has the burden of proof, makes out a prima facie case, he has fulfilled his obligation as to burden of proof, unless and until the objecting defendant has met his prima facie case by evidence in support of the objectives.

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sufficient to overcome that prima facie case. The accounting trustee, being the complainant, was first called upon to establish his prima facie case. The Master's ruling was correct to the extent that the testimony submitted by the trustee was such as established a prima facie case as to his accounts. The trustee's statement as to his accounts which he duly filed and a copy of which was attached to his amended bill of complaint, was properly verified. Both the trustee and his bookkeeper testified before the Master at great length and after a careful examination of the record, it is our opinion that their testimony made out a prima facie case to the effect that the trustee's accounts as presented and filed were proper and correct. While the burden of proof was upon the trustee and remained with him, upon his establishing his prima facie case, the burden of submitting testimony shifted to the defendants, who had filed objections to the accounts, and inasmuch as the Master had ruled and the Chancellor held, and we think correctly, that the objectors had not submitted any evidence showing that any of the items or matters covered by the trustee's account, and to which objection had been made, were either improper or incorrect, the further ruling of the Master and finding of the Chancellor to the effect that the trustee had fulfilled his burden of proving that his accounts were just and true, was proper.

The trustee's accounts showed that he had expended certain amounts for repairs on buildings belonging to the estate, while they were in possession of tenants under leases. It was contended that these expenditures were improper and should be charged to the trustee inasmuch as the leases under which the tenants were in possession provided that all repairs were to be made by them. This contention is not tenable. The

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testimony showed that the buildings in question were old and were located in a part of the City of Chicago where it was not easy to get desirable tenants, at best, and that in order to keep such tenants as were in the buildings and prevent them from leaving, it was necessary for the trustee to make the repairs in question.

It is further contended that the trustee should be charged for certain rents not collected. That this should not be done is shown by the fact that the property was in a poor locality where it was difficult to get tenants at all; that such as were secured were frequently not desirable from a financial point of view and on some occasions when they failed to pay the rent and were served with a five days notice, they vacated and as they were financially irresponsible, certain losses were inevitable. There is no showing that the trustee was not duly diligent in this regard.

One of the specific items in the account to which objection was made was one showing a payment of \$385.75 to Mary L. Dole as interest on her legacy of \$5,000. The deceased died February 16, 1902. The interest payments on this legacy appear to have been made in 1902, 1903 and finally in January 1904 when the legacy itself was paid. There was testimony to the effect that a note was originally given by the executor for this legacy and it was subsequently paid by the trustee. It is argued that at the time of the death of the testator, the time for presenting claims against estates of deceased persons, was two years and until that time was up, it could not be known whether there would be sufficient in the estate to pay the legacies, after meeting all claims that

might be allowed and therefore the legacy should not have begun to draw interest until two years after the date of the testator's death. Since the time for proving claims against such estates has been changed to one year, this court has held that a general pecuniary legacy draws interest from the time it is due and payable, which, when not fixed by the terms of the will, is one year after the testator's death. Bryfusa v. Brand, 189 Ill. App. 417. But this rule is subject to some qualification, for a legacy may become due and payable before the expiration of the time within which claims against the estate may be presented and allowed, although no specific time for such payment is fixed in the will. It is provided by Ch. 3, sec. 116 of our statutes that "whenever it shall appear that there are sufficient assets to satisfy all demands against the estate, the court shall order the payment of all legacies mentioned in the will of the testator, the specific legacies being the first to be satisfied."

If such an order was entered by the Probate Court in this estate the legacy in question would draw interest from the date of that order and in that event the payments of interest here called in question by the defendants would be entirely proper. As to this, as well as all other items, in his account, the trustee made out his prima facie case as before stated. That having been done, it became incumbent on appellants to introduce some evidence to the contrary. There is none in the record, as to this item, so far as we have been able to find, and none has been pointed out to us by appellants.

In that state of the record it was not error to hold that this legacy became due and payable from the date from which the trustee paid the legatee interest upon it as shown by his accounts, and that the interest payments were therefore proper.

The appellants further contend that the complainant trustee has received a double credit for a payment of \$5,000 as the award to the widow of the testator. Part of this award seems to have been given in chattels and part in cash and it appears from the record that so far as the cash was concerned it was paid in the form of a note by the complainant as executor and later as trustee he took up this note by paying the amount it called for in cash.

It further appears from the record that the trustee was conducting the business of J. M. Dole & Company as provided by the terms of the will of the testator and in many instances payments of amounts he owed as trustee were in fact not made by him individually but by J. M. Dole & Company, at his direction. There could of course be no objection to this as, to all intents and purposes, J. M. Dole & Company was a part of the trust estate. It is also in evidence that in case of a number of payments to Mrs. Dole, the widow, it was not convenient to J. M. Dole & Company to pay the cash out of its current funds at the times the payments were to be made and therefore it borrowed funds from the bank sufficient to make these payments at the times they were directed by the trustee to make them. The interest the company was obliged to pay the banks for these advances, was charged against the trustee on the company books and he is given credit for it in

his accounts which the chancellor approved. This also is assigned as error, it being appellant's contention that the trustee had no right, either in the law or under the will, to borrow money for the support of Mrs. Dole and that he therefore should not have credit for such interest in his accounts but should be held personally responsible for it. We do not agree with this contention. It was the express desire of the testator, as set forth in his will, that the trustee continue the testator's business, as long as it was deemed for the best interest of his trust estate to do so, in the opinion of the trustee and Mrs. Dole, the widow, and George S. Dole the testator's son, and this was done. This provision of the will gave the trustee express authority to employ the property and funds of the estate in the prosecution of the testator's business and in this connection the will read that "inasmuch as it is necessary from time to time for my business house in Chicago to accept time and sight drafts from business customers, and to borrow money and to incur obligations, necessary for the transaction of said business, I hereby authorize my said trustee to accept said drafts and assume said business obligations, and to borrow said money, on behalf of my said business, as it may become necessary in the transaction of my said business." To say that these provisions authorized the trustee to borrow money or warranted loans by J. H. Dole & Company for the purposes of the business of that company, but not to pay the widow, sums to which she was entitled, is begging the question. The continuance of the testator's business was expressly authorized in the will, "for the best interests of my trust estate." When money became due from that estate or was to be paid out

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education, and the need for employment. The result of this process is that the majority of the population now lives in cities and towns. This has a number of implications for the future of the United States. For example, it means that the majority of the population will be living in areas where there are a high concentration of people. This can lead to a number of problems, including overcrowding, pollution, and a lack of resources. It also means that the majority of the population will be living in areas where there is a high concentration of people who are not employed. This can lead to a number of problems, including poverty, crime, and social unrest. Therefore, it is important to consider the implications of the process of urbanization for the future of the United States.

of it by the trustee to the widow and he directed that it be paid to her by the business, as we think he was fully authorized to do, and it was thought best not to deplete the current company funds to the extent of the payments called for, it was entirely proper, under the express provisions of the will, for the company to borrow money from the banks for that purpose. It would have amounted to the same thing if the Company had made the payments to the widow out of its own current funds and then replenished them by loans from the banks for its business needs. Either way, would call for charging the interest involved against the account of the trustee on the Company's books.

Appellants complain of certain bank stock transactions made by the trustee. There came to the trustee as part of the original trust estate, 150 shares of the Capital Stock of the Continental National Bank. Sometime after Mr. Eastman took up his duties as trustee of the estate, this bank extended to its stockholders, the right to subscribe for additional stock. With the consent of the beneficiaries, including the original defendant Frances E. Leman, wife of the appellant Henry W. Leman, who now makes objection to the transaction, the trustee exercised his right and purchased an additional amount of 25 shares. Some time later there was a consolidation of the Continental National Bank and the Commercial National Bank and they later absorbed the American Trust & Savings Bank, and the trust estate became the owner of 270 shares of the stock of the consolidated banks. Subsequently 120 shares of this stock were sold and 150 shares retained and are still held by him. The appellants contend that the trustee should not have retained the stock, - that such stock is not a proper investment

for trust funds and that in retaining part of the stock, the trustee was acting not for the benefit of the trust estate but rather for the best interests of J. H. Dole & Company. Under ordinary circumstances trust funds should not be invested in bank stock, but under the provisions of the will involved here, it became proper for the trustee to do many things that it would have been improper for him to do but for those provisions. He was carrying on an active and in many respects hazardous commercial enterprise as requested by the testator in his will, - an enterprise however which was well established and had long been conducted successfully by the testator, and has since been carried on successfully by the trustee. This bank stock was part of the trust estate to begin with and the retention of all or a portion of it was not unwise with a view to supporting an adequate credit for J. H. Dole & Company. It was not only not wrong for the trustee, in this as well as in other transactions, to keep in mind the best interests of J. H. Dole & Company, for that meant the best interests of the trust estate to which J. H. Dole & Company belonged, but the record shows that the appellant Henry W. Leman, representing the interests of his wife and children, expressly approved the retention of part of the stock by the trustee if the latter was advised that such a course was necessary for the credit of J. H. Dole & Company. This was in a letter from Mr. Leman to Mr. Eastman, dated September 17, 1910. The appellants make objection that the trustee's accounts do not set forth how much he should have received upon the sale of this bank stock and they contend it was his duty to state fully and in detail the facts concerning this sale, that the beneficiaries might have

known that he realized the full value thereof and that he was justified in selling at that time. Again they contend that no explanation is made in the accounts, of the change from the "Continental" to the "Continental & Commercial National Bank" and that the evidence contains merely the bare statement that the banks were consolidated but as to the details of the consolidation, there is no evidence. None of these matters have any proper place in a trustee's accounts nor is evidence concerning them a necessary part of the prima facie case submitted by the trustee in support of his accounts. The trustee having made out his prima facie case in support of his accounts, if defendant's position as to these bank stock items, was that the trustee had not realized a proper amount for the shares sold, it was incumbent upon them to put some evidence tending to show that fact, in the record. Our attention has not been directed to any and we have not been able to find it. Moreover, there is in the record, a stipulation, setting forth the facts involved in the increase of the capital stock of the Continental National Bank and the changes that took place when that bank became the Continental and Commercial National Bank.

After the trustee had purchased the 75 shares of stock referred to, the estate owned 225 shares and the remaining 45 shares of the ultimate 370 shares owned by the estate, were acquired when the Continental National Bank was changed to the Continental and Commercial National Bank, and the capital stock of the bank was increased, the new stock being issued to the then stock holders on the basis of one new share for every five then held by the stockholder, the new stock being paid for by the declaration of a corresponding cash dividend. Defendants contend that the trustee's accounts do not account for these additional 45 shares at all. His accounts as attached

to his amended bill show that he has on hand, as of December 11, 1911, 150 shares of the consolidated bank stock. The same accounts, in the list of receipts, under date of September 23, 1910, contain an item reading, "Proceeds of sale of 120 shre. cap. stock of the Continental National Bank at 251 1/4, \$30,150." That would seem to account for all of the 270 shares including the 45 referred to.

It is further contended that these 45 shares cannot be considered as belonging to the principal of the estate but should be held to be income, and that the trustee should therefore be required to account for them to the life beneficiaries, which the decree entered by the chancellor did not require him to do. These shares came to the estate after the death of the testator's widow. The stipulation referred to above, giving the facts incident to the issuance of these shares of stock, shows that it was a stock dividend and the stipulation so refers to it. The bank, by resolution, "allotted" the new stock to the then stock holders on the basis of one new share for every five old shares and the resolution further provided that said new stock, "shall be paid for at the rate of \$100 per share by the declaration of said bank, out of its surplus and undivided profits, of a cash dividend of 20 per cent to its said shareholders." The stipulation is further to the effect that such cash dividend "was used by said Bank" to pay for said new shares. From the stipulated facts it does not appear that the bank's stockholders were given an option of taking the new stock or the cash dividend as they might elect, but on the contrary the new shares, which were paid for by the Bank, by means of the declaration of a 20 per cent dividend, from surplus and profits,

were allotted to the then stockholders. Under such circumstances the new shares became a part of the corpus of the estate belonging to the remaindermen and could not properly be considered as income belonging to the life tenants. Waterman v. Alden, 42 Ill. App. 394, 318 - 323; 144 Ill. 97, 99; Alson v. McKaven, 187 Ill. App. 193, 205-207, 214; 205 Ill. 306.

In the decree entered by the Chancellor in this case the trustee is given credit for certain amounts which his accounts show were expended for legal services and this is assigned as error, it being appellants' contention that all these services rendered by counsel employed by the trustee were for his personal benefit and not for the benefit of the estate. In our opinion the amount allowed (\$3400.00) was not excessive, as defendants also contend, and these items, under all the circumstances, which it would be impossible to detail here, were properly chargeable to the estate and not to the trustee personally.

Nor do we think it was error, under the evidence, to allow the trustee the sum of \$20,000, for his solicitor's fees in connection with this litigation and charge \$400 thereof against the trust estate and the balance against the interest of appellants in said estate. The trustee had apparently made every effort to avoid the litigation, which the record shows became necessary by reason of appellants' refusal to accept and approve the trustee's reports and accounts, and because of their objections thereto which they have not established as well founded.

It appears from the record that during the life time of the widow of the testator, certain sums of money

were paid to her from time to time as income, to which, she was entitled under the terms of the will. These sums were paid to her by J. H. Dole & Company at the direction of Mr. Eastman and according to the method of bookkeeping employed, they were charged against the trustee on the books of the Company. These amounts did not represent dividends declared by the company but were paid to her out of the company's treasury, as the trustee directed and it seems they were not put through the trustee's books. After the death of the testator's widow, J. H. Dole & Company declared a dividend of 24 per cent which meant a dividend to the trustee on his stock in the company, amounting to \$35,982. This dividend was credited by the company, on its books, to the trustee, to apply on his indebtedness which was made up of the amounts that had been advanced to the testator's widow from time to time. It is contended that this amounted to an appropriation of this dividend by the trustee and that, as the will directed that all income of the trust estate, arising after the death of the testator's widow, should go to the life tenants, the trustee should be compelled to account to them for it. These contentions are not tenable. It must be remembered that the business of J. H. Dole & Company was a part of the trust estate itself. The fact that money was paid to the widow out of the Company's funds rather than such funds as might be in the trustee's hands has no significance. It was a mere matter of convenience. It was entirely proper to make payments to the widow, through the company, without the formality of the declaration of a dividend provided the company was making money and the payments did not reduce the corpus of the estate. The record shows that while the payments to the

widow from the funds of J. H. Dole & Company exceeded dividends formally declared previous to her death, they did not exceed the profits earned during that time. To charge these payments to the trustee, on the company's books, and credit him with dividends from time to time, to the extent of such charges, was a mere detail of bookkeeping and to contend that a credit of such dividends to the trustee's account with the company, amounted to a personal appropriation of them by the trustee, is as unfounded and unreasonable as would be a contention that he, individually, owed the estate such amounts as were charged against him on the company's books, representing payments that had been made to the widow. If the dividend declared by J. H. Dole & Company after the death of the testator's widow, had been a dividend in cash coming to the estate from an outside corporation in the stock of which the funds were invested, it would no doubt be income to which the life tenants would be entitled, irrespective of whether the profits represented by such dividends, were earned before or after the widow's death, as the appellants contend. But this dividend did not represent any income coming to the estate; it was merely a bookkeeping operation involving the shifting of a fund by charging it to one account and crediting it to another. Under the broad powers conferred upon this trustee by the terms of the testator's will, with regard to the continuing and conducting of the business, and inasmuch as the corporation was formed under the circumstances and for the reasons already referred to, and because further it appears that payments, made to the

The first of these is the fact that the company was organized in 1901, and at that time it was a partnership. The second is the fact that the company was organized in 1901, and at that time it was a partnership. The third is the fact that the company was organized in 1901, and at that time it was a partnership. The fourth is the fact that the company was organized in 1901, and at that time it was a partnership. The fifth is the fact that the company was organized in 1901, and at that time it was a partnership. The sixth is the fact that the company was organized in 1901, and at that time it was a partnership. The seventh is the fact that the company was organized in 1901, and at that time it was a partnership. The eighth is the fact that the company was organized in 1901, and at that time it was a partnership. The ninth is the fact that the company was organized in 1901, and at that time it was a partnership. The tenth is the fact that the company was organized in 1901, and at that time it was a partnership.

widow during her lifetime, as called for by the will, were paid out of the profits of the business, as was proper, but that the formality of declaring a dividend was postponed for business reasons and for the best interests of the business, in the judgment of the trustee and of Mr. Sager, one of the active managers of the company's affairs, as shown by the evidence, we are of the opinion that it was not improper to credit the dividend declared after the death of the testator's widow against the previous charges on the company's books, made up of the payments that had been made to the widow from time to time.

In this, as well as in some other respects, the methods of the trustee with regard to keeping his books and accounts might have been better but they are not such as to occasion the breaches of trust for which the appellants contend.

For a period of time, subsequent to the testator's death, Mr. Leman and his family, made their home at the Sole homestead and made certain contributions to the household expenses, totaling \$2,605.58, in the form of monthly checks amounting to \$196.12 which were given to the trustee and were drawn to his order. The appellants claim the trustee's accounts are lacking in that they do not show these payments by Mr. Leman. Mr. Eastman's position is that he did not receive the payments as trustee, and that although they passed through his hands, they were not a part of the estate and have therefore no proper place in his accounts as trustee. In the absence of any showing by the objectors beyond that found in the record, the approval of the trustee's accounts, so far

as these items are concerned, cannot be considered as error.

Appellants contend that the trial court erred in the matter of the allowance of Master's fees,- both as to the statutory fees and those covering his special services. In connection with his claim for fees, the Master submitted an itemized statement of the services rendered. After a full hearing on this matter, many of the items included in that statement were disallowed and many of them were allowed. A careful study of the original order covering the allowance of Master's fees, as it appears in the record, (we find it incorrectly abstracted), demonstrates that the Master's statement presented a claim for services amounting to a total of \$16,812.36. The Chancellor disallowed many items included in the Master's statement of his special services, which amounts, so disallowed, aggregated \$2,117.50, making the total amount allowed by the Chancellor, \$8,695.36. Of this total \$2,399.40 was for stenographic expense; \$2,480.90 was for the Master's statutory fees and \$3,815.00 was allowed for special services rendered by the Master. The court based the allowance to the Master for his special services on a compensation of \$40 per day which would seem to be within the decision rendered by our Supreme Court on this subject in Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 154-156. At the hearing which was had before the court on this subject, several witnesses, members of the bar and former Masters in Chancery, testified as to the time which would be required to become advised as to the facts, and the law applicable thereto, and reach a conclusion as to the issues involved, and draft a report. This was proper. Fitchburg Steam Engine Co. v. Potter, *supra*, p. 157. They also were permitted to answer questions as to

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damages to the plaintiff in the event that the defendant is found liable.

Under the provisions of the act, the court is authorized to award

damages to the plaintiff in the event that the defendant is found liable.

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what in their opinion would be just compensation to be allowed the Master for such services. This was not proper. Fitchburg Steam Engine Co. v. Fetter, supra, p. 153. The fact that they were asked what a just compensation would be, rather than what the usual and customary compensation would be, is immaterial. However the error in admitting this evidence was harmless. The Chancellor properly disregarded their testimony entirely for he based the compensation he allowed the Master, on a rate of \$30 per day, which was less than any amount which had been mentioned by the witnesses.

As to the statutory fees allowed to cover stenographic expense, appellants contend that there is much in the way of argument and so-called cross-table talk that is in the record, which has no proper place there and that it was error to allow the Master an amount to cover stenographic expense based on a report containing such superfluous material. It is quite impossible, especially in a long record of a vigorously contested case, to segregate incidental argument arising in connection with rulings made or orders entered by the Master, from the testimony proper. However, there is one item included in the statutory fees allowed to the Master, to cover stenographic expense, which, in our opinion is not proper. In his itemized statement presented to the court, the Master certified that a stenographer was necessarily employed to take the oral testimony, amounting to 4647 numbered pages and several lettered pages, "and the arguments had before the Master amounting to 866 pages." To meet all of this stenographic expense, the Master was allowed an amount computed at 15 cents per folio, there being two and one-half folios to the page. We understand

that in their case it would be just to permit them to be
allowed the benefit for such services. This was not proper.
The Commission is of the opinion that the Commission should be
permitted to pay a just compensation for the
services rendered by the various and numerous organizations which
have been organized. However the amount of compensation should
be determined. The Commission properly determined
that it is not proper to pay the compensation in
advance. It is of the opinion that the Commission should pay
the compensation on a basis of 500 per day, which was paid
for the services rendered by the Commission.

As to the temporary loss allowed to some extent
for the expenses, the Commission decided that there is such a
great deal of argument and controversy about this that it
is the policy, which has no proper basis there and that it
is not proper to allow the Commission on account of their expenses
to be paid on a basis of 500 per day and 500 per day.
It is in fact impossible, especially in a long period of
time, to determine the amount of compensation for the
services rendered by the various organizations which have been
organized in connection with the various matters of the
Commission. From the testimony given, however, there
is one item included in the testimony that is allowed to the
Commission, to cover the expenses, which, in our opinion,
is not proper. In his testimony the witness presented to
the court, the witness testified that a reasonable amount
of money was paid to the various organizations, including
the various papers and several hundred pages, and
the Commission had before the court amounting to 500 per day.
To meet all of these expenses, the Commission decided
that an amount of 500 per day for the various
papers and one-half dollar for the various

from the record that the 866 pages referred to, covered the argument of counsel before the Master which followed the closing of the hearing of testimony. The statutory provision whereby the Master is allowed fees to cover stenographic expense, is limited to such expense as is necessary for the taking of the testimony, and while this may be considered as including such incidental argument as may arise during the progress of the hearing in connection with the taking of the testimony, it does not include any final arguments made after the taking of the evidence has been concluded. Therefore the item referred to, should have been disallowed to the extent of the portion covering the 866 pages referred to, amounting to \$324.75. Appellants contend that the Master was allowed a like amount as his personal statutory fees in connection with this same item. The record discloses that he was not only not allowed such an amount but further that he expressly excluded the 866 pages referred to, in the paragraph of his statement comprising the items going to make up his claim for his own statutory fees.

From a careful examination of the record, we are of the opinion that no error was committed by the trial court in the matter of allowing the Master his fees in this case, except as to the item we have referred to.

Complaint is also made as to the report filed by the Master, in that, in stating the accounts of the trustee, it follows an audit of the trustee's books and accounts which had been made by expert accountants, a copy of which was attached to the bill of revivor which had been filed.

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We are not aware of any rule which prevents a Master, in making his report in a case involving an account, from incorporating in it, as the statement of the account in controversy, such a statement of that account as has been made up and submitted by expert accountants, providing he believes from all the evidence he has heard, that the statement as so made up by the experts, is a just, true and accurate statement. The case of Fitchburg Co. v. Potter, *supra*, cited by appellants is not in point on this question. There the report was written up and handed to the Master by counsel for one of the litigants involved. It contained certain calculations and he was advised by counsel that these had been made by an expert accountant. The course of the Master was condemned, not by reason of his having adopted the figures of expert accountants or their statement of an account but because he had submitted a report containing findings, conclusions and recommendations in the case which were the creation of counsel for one of the litigants involved. That is not at all the situation in the case at bar.

During the course of this litigation, orders were entered on petition of certain of the appellants directing the trustee to pay certain amounts to Mrs. Leman and the trustee appealed from the orders so entered. It was held that the orders were not appealable and the appeals were dismissed. Eastman v. Selig, 199 Ill. App. 601. In connection with the same orders and on further petition, the trustee was ordered to show cause why he should not be

attached for contempt of court for failing to comply with the orders referred to and an order was later entered holding him in contempt of court and fining him for such contempt and also committing him to jail until the orders were complied with or until he should be released by due process of law. In this connection the trustee filed a habeas corpus petition and also appealed from the order holding him in contempt of court and fining him therefore in which appeal a decision is this day being filed. Costs and solicitor's fees in these various proceedings were allowed the trustee or at least the general claim for services rendered the trustee by his counsel, included services in connection with these proceedings, and presumably the allowance made by the court to the trustee for his solicitor's fees, included these items, and this is assigned as error. These proceedings were incident to this entire litigation and we see no reason why these particular items should not have been taken into consideration with all the other services rendered by counsel in fixing the amount of the fees to be allowed. There is nothing in the record to indicate that the proceedings in question were taken by the trustee by reason of anything other than his conviction that he was warranted in the position he had taken as to the subject-matter involved. There might well be some difference of opinion as to the wisdom of some of the steps he took and some that he did not take, but a reading of the record covering these matters is convincing, to the effect that whatever he did or did not do, was not the result of any arbitrary, unreasonable or capricious position on his part but because he felt, and the record discloses, with some reason, that his duty as trustee required him to take the course he did and for that reason

and that alone, he pursued it. All these matters arose during the progress of this litigation on petitions filed by appellants or some of them and they were not initiated by the trustee.

The occasion for these petitions and the proceedings that followed, was the fact that although the trustee had made certain payments to the other life tenants, he had not paid anything out of the income of the estate, to Mrs. Leman, nor after her death, to her children, as directed by the terms of the will. It is contended by the appellants that this constituted a flagrant act of misconduct on the part of the trustee and such as should have resulted in the denial of the prayer of his bill for an approval of his accounts and to be released of the trust, but rather the granting of the prayer of their cross-bill that the trustee be removed for misconduct. This contention of appellants is not referred to in any way by counsel for appellee in the brief which they have filed in this court. So far as we have been able to find from this very voluminous and intricate record, the trustee made no payments out of the income of the estate to any of the life tenants between the date of the death of the testator's widow, (from which time, under the terms of the will, the life tenants were to receive the income) and the date of the filing of the bill in this case, about two years later. Up to that time certainly, the trustee had made no discrimination between the life tenants as to distribution of income. The underlying causes for this litigation are difficult to state in a few words. Mr. Eastman and Mr. Leman had been close personal friends for many years. Mr. Eastman

The question for the court is whether the
 will is valid. The test is whether the testator
 was of sound mind at the time he executed the
 will. The burden of proof is on the party who
 claims that the will is invalid. The evidence
 in this case is conflicting. The testimony of
 the witnesses is not sufficient to establish
 that the testator was of sound mind at the
 time he executed the will. The court, therefore,
 finds that the will is invalid.

was named by the testator as executor and trustee in his will, at the suggestion, of Mr. Leman who drew the will, and the latter became the attorney for the estate and was consulted as counsel by Mr. Eastman as trustee when occasion arose. These gentlemen seem to have worked together and cooperated in the matters incident to the performance of the duties of executor and trustee of this estate by Mr. Eastman, as two brother lawyers whose friendship both personally and professionally had been of long standing, should. Some time in 1908, however, (which it will be noted was before the arrival of the time - the death of the widow - when the life tenants were entitled to the income of the estate), Mr. Leman took exception to a position which he alleged Mr. Eastman had taken with reference to a matter not in any way connected with this estate or with its management, and became very angry with him. This is clearly shown by certain correspondence appearing in the record. From that time on the history of this estate, as disclosed by the record of this case, was filled with a constant and in most instances utterly unreasonable attitude on the part of Mr. Leman representing his wife and children, which was as bitter as it was uncalled for, as a result of which the trustee sought relief by requesting an approval of his accounts and an agreement on the part of the parties in interest that he be permitted to resign and the trust administered by some one else. The other beneficiaries of the trust had at all times approved of the action of the trustee and from time to time had approved his accounts and were agreeable, under the circumstances, that he be permitted to resign as trustee but Mr. Leman, representing the interests of his family, refused to enter into any such arrangement. After

[illegible]

all efforts of the trustee to bring about such action without resort to litigation, had come to naught, he filed his bill.

As to these matters the decree entered by the Chancellor finds that after this litigation had been deemed necessary and was begun, George S. Dole and Julia H. Dole Marlbut objected to the trustee making payments of income to Frances E. Dole Leman because they contended that the litigation had been caused by her and needlessly protracted by her objections and it further finds that said contention was just and that the withholding of such payments to Frances E. Dole Leman was not a breach of trust on the part of the trustee and was justified. The decree further finds that George S. Dole and Julia H. Dole Marlbut had approved the acts and accounts of the trustee and had caused no expense or costs and that the Lemans had made groundless objections and had occasioned costs; that up to October 29, 1916 payments to Mrs. Marlbut had amounted to \$17,632.27 and to George S. Dole, \$17,600.00 and that \$5,000 had been paid to Frances E. Dole Leman under an order of court; that certain costs should be charged to the respective interests of the Lemans and certain others to the trust estate and that increased cost of administration for solicitor's fees by reason of the objections of the Lemans, to the amount of \$19,000, should be charged to their interests in said estate. The chancellor further found that such costs of suit and increased cost of administration as were chargeable to the Leman interests should be paid first, out of the money which would be payable to Henry W. Leman, an executor, Frances E. Leman Perkins and Sheldon Dole Leman, and second, out of the principal of the trust estate, and that the amount by which said principal

was thus reduced, should be restored by adding to principal, the income accruing to Frances E. Leman Perkins and Sheldon Dole Leman and that losses of income to Julia E. Dole Haribut and George S. Dole, by reason of reduction of principal, should be made good to them from income which might become due and payable to Frances E. Leman Perkins and Sheldon Dole Leman and it was further found that the \$5,000 paid to Frances E. Dole Leman under order of court, was not due her, in the adjustment of the equities and that Henry W. Leman, her executor, should refund said \$5,000 to the trustee and that a second order directing the trustee to pay an additional sum of \$5,000 to Frances E. Dole Leman and another order directing him to pay \$2,500 to Henry W. Leman, executor, (neither of which had ever been complied with) were improvidently entered and should be vacated. The decree further found that the accounts of the trustee should be approved, with two minor exceptions, and that upon the appointment of a new trustee, and upon the accounting of the complainant from October 22, 1916 to the date of the delivery of the trust property and assets to his successor, the complainant should be relieved from his trust and discharged and that all cross bills should be dismissed for want of equity. And the court entered a decree accordingly, and therein retained jurisdiction of the cause for the appointing of a new trustee and for the consideration of the accounting by the complainant to the date of the delivery of the property and assets belonging to the estate to such new trustee. In our opinion the evidence was such as to support all the findings of the decree.

It appears from different parts of the record that the reason why there were no payments of income to the life

and the same time, and no record of being in custody.

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tenants for some time following the death of the testator's widow, was the necessity of reserving from the income of the business of J. H. Dole & Company, an amount sufficient in the discretion of the trustee, to furnish necessary working capital for the business. While the will provided that upon the death of the testator's wife the trustee was to pay the net annual income of the estate to the life tenants share and share alike, it also requested the continuing of the testator's business and although the trustee was not directed by the terms of the will to continue the business, it is our opinion that its continuance xxxxxxxxxxxxxxxxxxxxxxxx was fully warranted by the facts as shown by the evidence, in view of the terms of the will expressing the testator's desire that it be continued "so long as in the opinion of my said trustee, and of my wife, Sarah F. Dole, and of my son, George S. Dole, or the survivor of them, it is deemed for the best interests of my trust estate so to do." And further, the will provided that so long as the business was conducted (and under the provisions of the will this period might properly extend into the time when the life tenants would be entitled to the net annual income) the trustee was to reserve "from the income of my business * * * an amount sufficient, in the discretion of my said trustee, to furnish the necessary working capital for said business, or for any other purpose in connection with said business, which, in the opinion of my said trustee, may be necessary."

It appears from the record that so far as payments by the trustee to George S. Dole are concerned, they did not reduce the amount of money in the hands of the trustee or of J. H. Dole & Company, as he, the said George S. Dole, had

assigned his interest in his father's estate to the company by reason of his indebtedness to the company and such payments as the trustee's accounts show were made to George S. Dole, were merely debits on the books of the company against it, and credits against the indebtedness of George S. Dole. These transactions therefore, involved no withdrawal of funds from the estate or the business of J. S. Dole & Company. It further appears from the record that Mrs. Hurlbut was in poor health and without income other than from this estate and for that reason the payments that went to her, were made.

It is our conclusion from the record that a reasonable course of conduct on the part of the Lemans would have avoided all this litigation and that in view of the fact that, on the contrary, the course they did pursue was occasioning very great expense, which might have to be met by the estate in the first instance but which might ultimately be charged against their interest in the estate, the trustee was justified in withholding payments to Mrs. Lemman, and the Chancellor was not in error in entering the decree requiring the return of the money that had been paid to her and charging the increased costs and expenses against the Lemman interests in the estate.

Again it may be said that the trustee should have paid the other amounts when the court entered orders directing him to do so, but as we view the issues involved in this case, they do not include that question. The decree entered, after a full hearing on the merits involved, and a consideration by the Chancellor, of the Master's findings and recommendations, finds that in view of all the facts in evidence,

the position that the trustee took to the effect that payments to Mrs. Leman and to her husband, as executor, should be withheld pending the outcome of the litigation she and her family had occasioned and were prolonging, was warranted and that the order in question should not have been entered. In our opinion this was not error.

It is further contended by appellants that the accounts of the trustee were improper and should not have been approved inasmuch as he did not keep his books or make his accounts with annual rests. As to this contention also, the brief of appellee filed in this court, is silent. In our opinion this could not properly be required in such an estate as the one involved here, by reason of the fact, that the broad powers contained in the will, by which the testator authorized his trustee to make such reservations from income for use in the conducting of his business as he might think necessary, amounted to a granting of authority to withdraw income and convert it into principal, in the trustee's discretion and as he might deem the best interests of the estate and of the business demanded. The provisions of this will were very broad and the discretion given the trustee was extensive and his actions as trustee must be passed upon in the light of these provisions. It is in this respect that many of the authorities cited by appellants are not in point, for the facts and the provisions of the will involved in the case at bar, are such as were not present in the cases cited nor were the facts involved in these cases analogous to those we find here.

Appellants have assigned one hundred and forty

errors in this court, but less than fifty are covered in their brief and some of those are not included in their argument of the case. Some of them have to do with questions of evidence but it would serve no purpose to comment on them here, and the same is true of several other matters to which appellants have specifically called our attention. It must not be understood that we have not examined or considered them because they are not expressly commented upon in this opinion.

The record presents no error which would warrant a reversal of the decree entered by the Chancellor. The Master in Chancery to whom this cause was referred, will re-pay to the clerk of the Circuit Court of Cook County, for Sidney C. Eastman, as trustee, the amount improperly allowed him, as above set forth, namely \$334.75, and the clerk of said court will pay over said sum of money to the said Sidney C. Eastman as trustee. (Rasch v. Rasch, 273 Ill. 261, 275) As so modified the decree of the Circuit Court, for the reasons we have stated, is affirmed,

DECREE RECORDED AND AFFIRMED.

every one of these cases, has been found to be in violation of the
law and none of them are not included in these arguments
of the Court. Some of them have to do with questions of law
and some with questions of fact. In some cases the Court has
found that the law is in favor of the government and in some cases
it has found that the law is in favor of the individual. It has not
yet decided what to do with the cases that are in violation of the
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221 - 24146

MARCUS HITCH, Trustee, etc..

Appellee,

vs.

R. HEE & COMPANY, a corporation,

Appellant.

213 I.A. 684

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE THOMPSON delivered the opinion of the court.

This is an appeal by the defendant, R. Hee & Company, from a judgment for the plaintiff in the sum of \$3,750.00 in an action of trover in which the plaintiff alleged a wrongful conversion of a printing press, by the defendant, and sought to recover the value thereof.

The Workers' Publishing Society owned and used the press in question, which we shall refer to as the Observer press. The society executed two chattel mortgages covering this press, "together with all other machinery and personal equipment said society may hereafter acquire," in both of which Marcus Hitch, the plaintiff herein was trustee. Both mortgages were duly recorded and thereafter the defendant R. Hee & Company, without any actual knowledge of these mortgages, sold the society a larger and more valuable press, which we shall refer to as the Hee press and in payment received \$500.00 in cash, and notes for \$4,500, secured by a purchase money chattel mortgage running to one Frederick S. Blackall, which was duly recorded, and the Observer press at a valuation of \$2,500, making the total

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483 A. I. C. 19

consideration for the Hoe press, \$7,500. Pursuant to this transaction the Observer press was removed from the premises of the society in September, 1912 and after being delivered to the defendant F.O.B. Chicago, was shipped to New York. About a week prior to December 1, 1912, the plaintiff, trustee under the two chattel mortgages covering the Observer press, became aware of what had taken place, and on November 30, 1912 he took possession of the offices and plant of the Publishing Society, with all its property, including the Hoe press which had been installed. About this time the Publishing Society went into bankruptcy and the Central Trust Company was appointed trustee in bankruptcy by the United States District Court and took possession of all the property of the bankrupt on December 5, 1912. A few days later Frederick S. Blackall filed a petition in the United States District Court in the bankruptcy proceedings setting up his interest in the Hoe press, under the provisions of his purchase money chattel mortgage and praying that his rights and lien might be preserved and satisfied. Pursuant to that petition, an order was entered by the United States District Court finding that the lien of the petitioner, was a first lien on the Hoe press and on April 5, 1913, it was sold at public sale and bid in by the defendant at the purchase price. On the day before this sale the plaintiff made a written demand on the defendant for the return of the Observer press.

The trial court found that the two chattel mortgages first referred to, were a valid lien upon the Observer press and that inasmuch as defendant had wrongfully converted and appropriated it, plaintiff was entitled to recover its value, which the court found to be \$3,000, the balance of the judgment for interest on that amount.

In contending that the judgment appealed from is erroneous and should be reversed, the defendant alleges that a chattel mortgagor in possession, may substitute other articles for those covered by the mortgage provided he does not depreciate the value of the security and that the articles so displaced by the new ones, may be disposed of by the mortgagor as his own property, unaffected by the mortgage. It is further contended that the lien of such a mortgage attaches to the new articles so substituted, especially where the mortgagee takes possession before the rights of third parties intervene and that the mortgagor having substituted the more valuable Hoe press for the Observer press and the mortgagee having ratified that exchange by taking possession on November 30, 1912, the latter released his lien on the Observer press and the mortgagor had the right to dispose of it free of the lien and further that the mortgagee having failed to press his lien acquired on the new Hoe press and permitted the United States District Court without objection on his part, to find that Blackall's lien was a first lien on that press, he is bound by that finding and cannot now assert his lien on the Observer press. It is further contended that the mortgagee plaintiff, having consented to the substitution of the presses by taking possession on November 30, 1912, he was bound to pursue his lien on the new Hoe press and attend the sale thereof and bid it in, in order to protect his lien thereon which had attached to that press in lieu of the Observer press, and that plaintiff was guilty of laches in not demanding possession of the Observer press as soon as he learned of its removal instead of over four months afterward and in not asserting his right to a lien upon the Hoe press, upon taking possession and continuously thereafter.

We do not agree with these contentions. Where there is a substitution of other property in place of that described in the mortgage, by agreement of the mortgagor and mortgagee, the mortgage will be a lien upon the substituted property as between the parties and also as against third parties, where the latter have notice of the agreement or where the mortgagee takes the substituted property into actual possession before the rights of such third parties intervene. Jones on Chattel Mortgages, 5th Ed. Art. 71, 134. Rhines v. Phelps, 8 Ill. 456; Bell v. Shreve, 14 Ill. 462, 464.

But the substitution of the Hoe press for the Observer press in the case at bar was without the knowledge of the plaintiff or the mortgagees under the original chattel mortgages and such substitution was never consented to by either plaintiff or the mortgagees. The plaintiff cannot be considered as having consented to the substitution when he took possession of all the mortgagor's property on November 30, 1912, after he had learned of the substitution. By making such a substitution, without the knowledge or consent of the mortgagees, the mortgagor could not in any way interfere with the lien of the mortgagees on the Observer press. That lien continued to be perfectly valid, notwithstanding the substitution. The defendant had a good first lien on the Hoe press at all times by virtue of their purchase money chattel mortgage which was duly acknowledged before the Clerk of the Municipal Court of Chicago and duly entered by him on September 30, 1912.

The plaintiff trustee under the original chattel mortgage, acted with entire consistency and wholly within his rights in relying upon the lien he had under his chattel

mortgages, on the Observer press and he was under no obligation to pursue or attempt to pursue any alleged lien on the Hoe press whether prior or subsequent to the defendant's lien on that press. Nor was the plaintiff guilty of laches in not making a demand for the Observer press until he did as above set forth.

Even under defendant's theory, the plaintiff should recover, for the substituted Hoe press greatly decreased the property in the mortgagor's possession and did not increase it, for all that the mortgagor had after the substitution, was the equity in the Hoe press which the evidence shows was, considerably less than the value of the Observer press.

The only other point urged is that the judgment is excessive. The evidence as to the value of the Observer press was conflicting. It would serve no purpose to refer to it in detail here. We have examined it with care and our conclusion is that it fully warrants the finding of the court that it was of the value of \$3,000.

For the reasons stated we find no error in the record and therefore the judgment of the Superior Court is affirmed.

AFFIRMED.

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237 - 24162

JOHN McCARTHY,

Appellee,

vs.

MARGARET A. McCARTHY et al
On appeal of BERTHA H.
McCARTHY,

Appellant.

2131.A. 685

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

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MR. JUSTICE THOMSON delivered the opinion of
the court.

This is an appeal by the defendant, Bertha H. McCarthy from a decree for complainant in a suit for partition. One Denis McCarthy died intestate on September 1, 1907, leaving surviving him his widow, Margaret A. McCarthy and six children, three sons and three daughters. The three surviving sons were Jerome J., John and Charles. Jerome J. McCarthy was married, his wife being Bertha H. McCarthy, the appellant herein. On September 16, 1911, Jerome J. McCarthy died testate. The appellant Bertha H. McCarthy was his sole beneficiary.

There were several parcels of real estate included in the estate of Denis McCarthy, two of which were originally the subjects of this suit for partition. We shall refer to them as the Belmont avenue property and the Clark street property. While these proceedings were pending the parties hereto adjusted their respective interests in the Belmont avenue property and it was eliminated from the case and is not now involved.

On December 23, 1910, Jerome J. McCarthy and his wife Bertha executed their trust deed to the Chicago Title & Trust Company, trustee, conveying their interest in the Belmont avenue property, to secure payment of their promissory note for \$550.

On January 13, 1913, Bertha H. McCarthy (then a widow) executed her trust deed to William S. Hefferan, trustee, conveying the Clark street property, to secure her note for \$2,500.

On March 23, 1914, John McCarthy, one of the surviving sons of Denis McCarthy, deceased, filed this bill for partition, making parties defendant, his mother, his sister-in-law, Bertha H. McCarthy, the appellant, and the other tenants in common, his sisters and his brother Charles, also the Chicago Title & Trust Company, as trustee under the trust deed first above referred to and the unknown owners and holders of the note secured by that trust deed, and William S. Hefferan, as trustee, under the trust deed last above referred to and the unknown owners and holders of the note secured by that trust deed, and also certain other formal parties.

On March 27, 1914, the summons which was issued in this case, was served on the defendant Chicago Title & Trust Company and as the other defendants it was later returned "not found".

On the same day, March 27, 1914, Bertha H. McCarthy, executed another trust deed to William S. Hefferan as trustee, conveying the Clark street property, to secure her promissory note for \$500 and this deed was recorded on April 3, 1914.

On May 7, 1914 an alias summons was issued, and this

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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On March 27, 1964, the document which was issued in
this case, was copied on the document which was a copy
of the other documents it was being referred

was served on William S. Hefferan on May 8, 1914 and on appellant on May 23, 1914.

On June 20, 1914, William S. Hefferan filed his answer in which he set up that he was not only trustee under the trust deed given to secure the \$2,500 note but also under the later trust deed given to secure the \$500 note, and his answer described the latter note fully.

On June 6, 1914, Bertha H. McCarthy filed her answer. The complainant filed exceptions to this answer, which were sustained and she later filed her amended answer, admitting various of the allegations of the complainant's bill but denying the allegation that no persons other than the parties complainant and defendant have any valid right, title, interest or claim in and to the premises in question.

After the case was at issue, it was referred to a Master where certain hearings were had. After the complainant had closed his proofs, William S. Hefferan was substituted as solicitor for appellant.

On September 22, 1914, Charles McCarthy filed a bill to contest the will of Jerome J. McCarthy making his mother and his brothers and sisters as well as Bertha H. McCarthy, the widow of Jerome J. McCarthy, parties defendant, which cause was pending when the decrees here appealed from was entered.

Among other things, the Master found that the court had jurisdiction of the parties and the subject-matter involved and that the complainant had properly set forth the rights and interests of all the parties in his bill of complaint and that

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no good or substantial defense had been interposed by appellant or any other defendant and that the usual, customary and reasonable solicitor's fee for the work performed and to be performed by complainant's solicitor was \$5,000 and that the same should be taxed as costs and allowed to complainant as and for his solicitor's fees. He further found the defendant Bertha H. McCarthy had never claimed any right, title or interest in the property involved, different from that set forth by complainant and that she offered no defense herein except in the matter of the allowance of solicitor's fees and that she had offered no objection to the admission of any of the testimony offered by complainant as to solicitor's fees, which was the only testimony submitted on that subject.

The objections and exceptions filed to the Master's report were overruled and a decree was entered, wherein the court found the respective interests of the parties, decreed a partition as prayed by complainant, and appointed three Commissioners to go upon the property in question and make partition, and the decree provided that if the Commissioners found that a division of the premises could not be made without manifest prejudice to the parties in interest, they should value the property and make a report to the court.

In contending that the decree herein should be reversed, it is first urged that the legal holders and owners of the \$500 note secured by the second trust deed executed by Bertha H. McCarthy, widow, were proper and necessary parties to these proceedings and that it was error to enter any decree until they had been made parties.

This cause did not become lis pendens as to Bertha

H. McCarthy until May 28, 1914, the date of the service of summons on her. Grant v. Bennett, 96 Ill. 513; Hallorn v. Trum, 125 Ill. 247; The Franklin Savings Bank v. Taylor, 131 Ill. 376; Allison v. Drake, 145 Ill. 506, 516; Bennett on the Law of Lis Pendens, Sec. 53, 62. But this question is not controlling here.

In his answer, the defendant Hefferan sets up that he is trustee under this trust deed and he prays that in any decree which is entered in this cause, the rights of the legal holder and owner of this \$500 note shall be preserved and protected. At one of the hearings before the Master, this defendant appeared as a witness and produced this trust deed and the \$500 note and introduced them in evidence and they were duly received in evidence, while he was testifying. The decree, later entered by the trial court, finds that Bertha H. McCarthy had an undivided one-sixth interest in the property in question and that her interest is subject to the lien of this trust deed and that her right and interest in and to the premises shall be made subject to any sum of money due under said trust deed and the \$500 note secured thereby and in case of a division of said property, the lien of this trust deed shall be attached to the interest of Bertha H. McCarthy only, and in case of the sale of said premises, the amount due under said trust deed and the note secured thereby shall be deducted from the distributive share of the said Bertha H. McCarthy.

With the filing of the answer of the defendant Hefferan and the making of the proof referred to, in this record, the owner or owners of this \$500 note can hardly be said to be "unknown", as they are referred to by appellant.

1. Notwithstanding to the contrary of any law, ordinance, regulation, order, or resolution of any municipal corporation, or of any state or federal government, or of any court of law or equity, or of any other authority, the undersigned do hereby certify that the following is a true and correct copy of the original as the same appears in the records of the City of New York, to wit: The City of New York, County of New York, Office of the City Clerk, dated the 1st day of January, 1900.

IN WITNESS WHEREOF, the undersigned, the City Clerk of the City of New York, has hereunto set her hand and the seal of the City of New York, at the City of New York, this 1st day of January, 1900.

City Clerk

With the filing of the record of the foregoing, the undersigned do hereby certify that the same is a true and correct copy of the original as the same appears in the records of the City of New York, to wit: The City of New York, County of New York, Office of the City Clerk, dated the 1st day of January, 1900.

If the defendant Hefferan is not himself the owner of this note,- an inference which would not be unwarranted by the proof of his possession of it, without explanation,- he at least is shown by the record to be the duly authorized agent of the owner, with possession of the note for the purpose of being fully protected so far as this case is concerned, which purpose has been accomplished as shown by the provisions of the decree referred to above. Under this state of facts, the rights of the owners of this note are fully adjudicated, as well as protected, by this decree and the appellant Bertha H. McCarthy has no cause to complain because publication was not made as against alleged "unknown owners" of this note after she was served with summons. It became unnecessary to take any steps to bring the owners of this note into this case because they came in, through the filing of the appearance and answer of the defendant Hefferan, as shown by his testimony which we have referred to.

Appellant further contends that it was error to enter any decree fixing the rights of the parties, or for partition, until the bill filed by Charles McCarthy to contest the will of Jerome J. McCarthy had been disposed of.

In one of the exceptions to the Master's report, which was overruled by the decree afterwards entered, appellant contended that the Master had erred in finding that she was the owner of an undivided one-sixth of the premises in question subject to certain items, the alleged error lying in the fact that the Master had failed to include in such items, the right of Charles McCarthy, one of the heirs at law of Jerome J. McCarthy, to appear within one year after

The first of these is the fact that the
 Government has not been able to
 obtain the necessary information
 to enable it to make a proper
 estimate of the value of the
 property. This is due to the
 fact that the Government has
 not been able to obtain the
 necessary information to enable
 it to make a proper estimate
 of the value of the property.
 This is due to the fact that
 the Government has not been
 able to obtain the necessary
 information to enable it to
 make a proper estimate of the
 value of the property.

In one of the conversations with the Russian's agent,
 it was stated by the agent that the Russian's agent
 had stated that the Russian had been in the United States
 for the purpose of an individual investigation of the Russian
 government and to see what kind of a situation existed in
 the United States. The Russian's agent had stated that
 in the past the Russian had been in the United States
 for the purpose of an individual investigation of the Russian
 government and to see what kind of a situation existed in
 the United States.

the removal of his disability of infancy, and by a bill in chancery, contest the will of the said Jerome J. McCarthy. We do not agree with these contentions as to the litigation instituted by Charles McCarthy to contest the will of his brother, appellant's husband. The existence of that litigation had nothing whatever to do with the interest of appellant in the property in question, so far as this case is concerned.

Appellant's final contention has to do with the allowance of complainant's solicitors fees. While the case was being heard before the Master, the complainant introduced evidence as to solicitor's fees, without objection on the part of appellant. Under the decisions of our Supreme Court the submission of testimony on that subject before there had been any decree for partition or adjudication of the rights of the parties, was premature. Haynes v. Jennings, 262 Ill. 269.

Although all exceptions filed by the appellant to the Master's report, including those on the subject of the complainant's solicitors fees, were overruled, we do not consider this such error as calls for a reversal of the decree, inasmuch as it is silent on this subject. The decree taxes no fees and allows none but it is properly confined to an adjudication of the rights of the respective parties to the premises sought to be partitioned and decrees a partition as already described. This question of the allowance of fees is therefore not before us.

Presumably after the commissioners named in the decree have made the partition therein prescribed or submitted

The records of the Commission are in the hands of the Secretary, and it is his duty to see that they are kept in proper order. The Commission has no right to interfere with the Secretary's duties in this regard. The Commission's only right is to see that the records are kept in proper order and that they are accessible to the public. The Commission has no right to interfere with the Secretary's duties in this regard.

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Although all measures taken by the Commission to the Secretary's report, including those in the subject of the Commission's activities, were considered, no action was taken. This was not an error on the part of the Commission, inasmuch as it is stated in this report, the Commission has no right to interfere with the Secretary's duties in this regard. The Commission's only right is to see that the records are kept in proper order and that they are accessible to the public.

Thereafter, after the Commission had taken the necessary steps to be satisfied and to secure a complete and accurate record of the Commission's activities, the Commission has no right to interfere with the Secretary's duties in this regard. The Commission's only right is to see that the records are kept in proper order and that they are accessible to the public.

the report contemplated and directed by the terms of the decree, the trial court will direct such further proceedings in the cause, as are prescribed by law and as may do equity as to all the interested parties.

For the reasons stated the decree of the Superior Court is affirmed.

AFFIRMED.

THE UNIVERSITY OF CHICAGO
LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637
U.S.A.

303 - 24230

ALFRED NELSON.

Appellee.

2131.A. 685

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

HENRY L. NEWHOUSE,

Appellant.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action in which the plaintiff Alfred Nelson, sought to recover from the defendant, Henry L. Newhouse, for labor and materials furnished in building a fire wall, laying coping and filling or bricking up certain window openings, upon the premises owned by the defendant. The latter has appealed from a judgment for the plaintiff for the sum of \$150.00.

It is urged that the judgment should be reversed by reason of the fact that the finding of the trial court, a jury being waived, is against the manifest weight of the evidence, and that the plaintiff's testimony as to the existence of a contract between the parties, being unsupported by any other evidence and flatly contradicted by the defendant and another witness, the parties being equally credible, the plaintiff cannot be considered to have furnished that quantum of affirmative proof which the law requires to sustain a judgment.

The plaintiff was a mason contractor, who had done considerable work from time to time in connection with buildings on which the defendant was the architect. The evidence

583 .A.1619

was flatly contradictory. It was the contention of the plaintiff that he had done the work in question at the defendant's request, and without any agreement having been made as to the amount to be paid for it. Some time after the work was finished, the plaintiff sent the defendant a bill for what he claimed was the actual cost of the material and labor furnished and he testified that he did not include any profit in his charge by reason of the fact that he got considerable work from the defendant as an architect. On the other hand it was the defendant's contention that when he asked the plaintiff if he could do some work for him, the latter stated that he could and that after the nature of the work had been explained to the plaintiff the latter stated, that inasmuch as it was a small job and he had some old brick which he had to haul away anyhow, which he could use in the job, "he would do it for me without cost." A young woman employed in the defendant's office gave testimony corroborating the defendant. Among other things she testified that after they had received the plaintiff's bill, the latter called at the defendant's office upon request, and upon that occasion "Mr. Newhouse told Nelson that the bill was out of all reason, and offered him \$100 which he thought was a fair and just charge." In testifying about this conversation the defendant stated that he had asked the plaintiff how it came that he had sent in a bill for the work, after he had agreed to do the work for nothing, whereupon the plaintiff replied that he had not intended to send a bill but that inasmuch as he had not received any work out of the defendant's office for some time, and he had lost money in a bank failure and was hard up, he had concluded to send in a bill. In reply to this

[illegible]

the defendant testifies that he said, "Well, let me see what you have done; this bill looks away out of reason. * * * if you were bidding on this job you would be entitled to about \$100 * * * I am willing to pay you what it is reasonably worth if I pay you anything at all." In rebuttal the plaintiff denied this conversation.

This record does not present a case in which the plaintiff is without any corroboration and is flatly contradicted by the defendant who is corroborated. We find some testimony in the record which was presented by the defendant which, in our opinion, tends to corroborate the plaintiff. In this state of the record, we can not say that the finding of the trial court is against the manifest weight of the evidence.

It appears from the record that after the conclusion of the testimony the trial court made some remark to the effect that he would "equalize the amounts on these various figures." The defendant contends that such a course on the part of the trial court, deprived him of a fair trial as the court had no right to simply strike an average of the respective claims of the parties, and that the judgment so arrived at, is unsupported by any judicial determination of the facts. The defendant admits that in many cases it is undoubtedly proper and fair to reconcile differences in figures based upon opinion. In the case at bar the defendant had introduced witnesses who had made the actual measurements of the work done and thus computed the amount of material furnished and the time necessary to do the work, and they stated that to build the wall of second hand brick would cost about \$11.00 or \$12.00 a thousand, the brick setting

about \$3.00 a thousand and the labor would cost about \$9.00 or \$9.00 a thousand. Of course such testimony involved the opinion of the witness, and there was other testimony submitted by the plaintiff, both as to the cost of the material and the labor, and as to what a fair and reasonable price would be for doing this work at the time it was done. We are of the opinion that it was quite proper for the trial court to endeavor to reconcile the differences as submitted by the various witnesses, all of which involved in some manner their opinions, and we presume that the statement of the trial court was equivalent to a statement that that was what he proposed to do and what he did do.

For the reasons stated the judgment of the Municipal Court is affirmed.

AFFIRMED.

174 - 24095

BRIGGS & TURIVAS, a
corporation, Appellant,

vs.

ERIE IRON & STEEL COMPANY,
a corporation, Appellee.

213 I.A. 685

Appeal from

Municipal Court

of Chicago.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Plaintiff (appellant), brought an action against defendant, the Erie Iron & Steel Company, for \$1,035.64 as the balance due for material delivered to the defendant under a certain written contract. Defendant filed a claim of set-off for \$431.10 thereto, whereupon the court entered judgment for plaintiff in the sum of \$604.54, the undisputed balance, and issues were joined on the set-off. At the close of all the evidence, the court found for the defendant on its said claim of set-off, and from the judgment entered thereon plaintiff has prosecuted this appeal.

By the terms of the said contract, plaintiff agreed to ship, pursuant to defendant's orders, 300 tons of certain turnings, at a price of \$9.75 per gross ton, for which payment was to be made, 75% cash on delivery, the balance to be paid upon receipt of returns by defendant from the purchaser.

The evidence shows that plaintiff shipped approximately 213 tons of the said turnings under the aforesaid agreement, several carloads of which were rejected by one of defendant's customers because they were not

2131.A.685

Municipal Court
of Chicago.

Plaintiff (appealant), brought an action against
defendant, The Iron & Steel Company, for \$1,035.64 as
the balance due for material delivered to the defendant
under a certain written contract. Defendant filed a claim
of set-off for \$431.10 therefor, whereupon the court entered
judgment for plaintiff in the sum of \$604.54, the undisputed
balance, and issues were joined on the set-off. At the
trial of all the evidence, the court found for the defendant
on the said claim of set-off, and from the judgment entered
thereon plaintiff has prosecuted this appeal.

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of certain turnings, at a price of \$9.75 per gross ton,
for which payment was to be made, 75% cash on delivery,
the balance to be paid upon receipt of returns by defendant
from the purchaser.

The evidence shows that plaintiff shipped
approximately 213 tons of the said turnings under the
aforesaid agreement, several carloads of which were rejected
by one of defendant's customers because they were not

adaptable for use in a certain type of blast furnace. This gave rise to an extended controversy between defendant and plaintiff respecting the quality and kind of turnings specified in the agreement, which culminated in the refusal of plaintiff to make further shipments. After a short lull in the controversy, during which time the price of turnings advanced defendant wrote plaintiff demanding shipment of the remainder of the turnings due under the said agreement, to which plaintiff replied that it had canceled the said agreement because of the difficulty it had experienced in inducing defendant to accept turnings shipped in accordance therewith, and requested payment of the balance due it on shipments made, amounting to upwards of \$1,000.00. Thereupon defendant telegraphed plaintiff demanding fulfillment of the agreement and stating that payment of said balance would be withheld pending further deliveries.

No further shipments were made by plaintiff, and because of this fact defendant refused to pay the balance due on the shipments already received, despite the admitted fact that it had received full returns from the purchasers.

The sole question here presented for determination is whether or not defendant was entitled to a set-off for damages alleged to have been sustained because of plaintiff's refusal to make the remaining shipments under the aforesaid agreement.

While it is well settled that where a breach of contract has been committed the innocent party may elect to keep the contract alive for the benefit of both parties, yet it is equally well established that in doing so he must either perform or be at all times ready and willing to perform his part thereof. L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59.

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in the agreement, which culminated in the refusal of plaintiff
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refusal to make the remaining shipments under the aforesaid
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contract has been committed the innocent party may elect
to keep the contract alive for the benefit of both parties,
yet it is equally well established that in doing so he must
either perform or be at all times ready and willing to
perform his part thereof. E. E. v. E. E. v. Richards

It will be seen from the foregoing, that after plaintiff had notified defendant of its intention to discontinue shipments of turnings, defendant demanded that the contract be fulfilled, but refused to pay plaintiff the balance due on shipments already received. There can be no doubt that defendant thereby elected to keep the contract alive; and having so elected, it was necessary for defendant to perform its part of the agreement by paying the balance due on shipments already received, which was over-due under the terms of the said agreement, or if it wished to make payment by setting off such amount against any damages resulting from plaintiff's refusal to make further shipments, it was incumbent upon defendant to make a distinct offer so to do. Having failed to do either, defendant is not entitled to damages. Harber Bros. Co. v. Moffatt Cycle Co., 151 Ill. 84; Chicago Washed Coal Co. v. Whitsett et al., 278 Ill. 623.

It follows, therefore, that the trial court erred in allowing defendant's said claim of set-off.

Accordingly the judgment will be reversed and judgment entered here for plaintiff in the sum of \$465.17, this being the amount of the said set-off plus interest at the rate of five per cent (5%) to the date of the filing of this opinion.

REVERSED AND JUDGMENT HERE.

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 to make a distinct offer so to do. Having failed to do either,
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Chicago Washed Coal Co. v. 151 Ill. 64; Chicago Washed Coal Co. v.
Hopper Bros. Co. 278 Ill. 625.
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 entered here for plaintiff in the sum of \$465.17, this being
 the amount of the said set-off plus interest at the rate of
 five per cent (5%) to the date of the filing of this opinion.
 REVERSED AND JUDGMENT HERE.

I. LURYA LUMBAR COMPANY,
a corporation,
Appellant,

vs.

Koehn

BERTHA M. KOEHN et al.,
Appellees.

213 I.A. 685

Appeal from
Circuit Court,
Cook County.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant, the I. Lurya Lumber Company, from an order dismissing for want of equity its bill seeking to establish a mechanic's lien.

It appears that one Henry W. Pfaff was the beneficial owner of the real estate here in question, the legal title to which was in one Bertha M. Koehn, his sister-in-law; that on October 18, 1915, he sold said property to George Kindel and Theresa Kindel, his wife, and conveyed title by means of a warranty deed duly executed by the said Bertha M. Koehn, which was filed of record October 26, 1915; that on the date of sale (October 18, 1915) the said George and Theresa Kindel entered into a contract with the said Pfaff, by the terms of which the latter agreed to construct a building on said premises for the sum of \$27,500.00; that on November 8, 1915, the said Pfaff executed a sub-contract with one Lipavsky, whereby the latter agreed to do all the carpenter work required in the construction of said building, for the sum of \$7,580.00; that in connection with said sub-contract, the said Lipavsky ordered lumber of complainant which was duly delivered and used in the construction of said building.

After the execution of the principal contract referred to and during the progress of the work, difficulties arose with respect to the payment of moneys due the various

1900

87 A. 13 12

The construction of said building.

In compliance with said subpoenaed, the said libelous ordered
in connection of said building, for the sum of \$7,800.00; that
said party agreed to do all the expenses were required in the
libel exposed a sub-contract with one Libbey, whereby the
sum of \$7,800.00, that on November 9, 1916, the said
the latter agreed to construct a building on said premises for
into a contract with the said York, by the terms of which

(Exhibit A, 1916) the said George and Theresa Kinder entered
and filed of record October 25, 1916; that on the date of sale
which had duly executed by the said David H. Roebuck, which
Theresa Kinder, his wife, and conveyed title by means of a
October 18, 1916, he sold said property to George Kinder and

said as in the Deeds N. Roebuck, his sister-in-law; that on
owner of the real estate here in question, the legal title to
it appears that was Henry W. Kraft was the beneficial

his will seeking to establish a mortgage lien.
Robert Kraft, from an earlier discharging for want of equity
this is no appeal by the respondents, the I. Kraft

After the completion of the physical component
referred to and under the progress of the work, attention
was given to the payment of money due the various

contractors and material-men, and to relieve the situation certain conveyances of the premises were made thereafter, which, however, in no way effect the question here under consideration.

The bill of complaint alleged that the said Bertha M. Koehn, being the owner of the premises in question, on October 18, 1915, executed a contract with said Pfaff for the construction of a building thereon; and that it had served notice on her as such owner, of its intention to claim a mechanic's lien on said premises, for the lumber delivered as aforesaid.

The undisputed evidence shows that the building contract referred to was executed by and between the said George and Theresa Kindel and the said Pfaff, on October 18, 1915, at which time the former were the owners of said property; that the warranty deed conveying the title thereto was filed for record before the said Pfaff had sublet the carpenter work to the said Lipavsky.

It will be seen, therefore, that there is a fatal variance between the allegations of the bill and the proof made thereunder, both as to the ownership of the property at the time the principal contract was made, and as to the parties thereto. It is a fundamental rule in equity pleading that the allegations of the bill and the proof thereunder must correspond (Doran v. Geuder, 171 Ill. 362), and because of such variance the court properly dismissed the bill of complaint. Cosgrove v. Parwell, 114 Ill. App. 491.

In this view of the case it becomes unnecessary to discuss any of the other points raised by the parties hereto.

Accordingly the decree will be affirmed.

AFFIRMED.

...and material-man, and as to relieve the situation
...of the business were made... which
...in no way affect the question here under consideration.

The bill of complaint alleged that the said parties

...being the owner of the premises in question, on
...a contract with said party for the
...of a building thereon; and that it had served
...of the intention to claim a
...for the same, for the purpose of obtaining an
...of the same.

The undisputed evidence shows that the building

...to and executed by and between the said George
...and the said party, on October 12, 1911, at
...the corner of said property; that
...the same was filed for
...the said party and against the respondent work to
...the said party.

It will be seen, therefore, that there is a total

...between the allegations of the bill and the facts
...both as to the ownership of the property as
...and as to the
...it is a fundamental rule in equity pleading
...of the bill and the facts thereunder must
...Deane v. Deane, 171 Ill. 382, and because of such
...the court properly dismissed the bill of complaint.

Deane v. Deane, 171 Ill. App. 301.

In this view of the case it becomes unnecessary to
discuss any of the other points raised by the parties hereto.

Accordingly the decree will be affirmed.

APPROVED.

327 - 24254

SAVERIO BARCIA, Admr. of the
estate of JOSEPH BARCIA,
deceased,

Appellee.

vs.

SANITARY DISTRICT OF CHICAGO,
CITY OF CHICAGO, CHICAGO SURFACE
LINES, and CHICAGO RAILWAYS
COMPANY,

CITY OF CHICAGO,

Appellant.

213 I.A. 685

Appeal from

Circuit Court,

Cook County.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$3,500.00 in favor of appellee (plaintiff), as administrator etc., against the defendant, the city of Chicago, for negligently causing the death of one Joseph Barcia, plaintiff's intestate.

Suit was originally brought against the city of Chicago and several other defendants jointly. The latter, however, were dismissed out of the case at the close of plaintiff's evidence.

It appears that on the evening of April 11, 1914, plaintiff's intestate, a boy of eighteen, was found lying unconscious near the corner of Larrabee street and Chicago avenue. He was removed to a hospital, where an examination revealed, among other things, that he had suffered an electric shock. Death ensued shortly thereafter.

The negligence charged was the maintenance of a certain iron pole located at the northeast corner of the aforesaid streets, from the top of which an electric arc lamp belonging to defendant was suspended, which said pole, it was alleged, had become charged with electricity because of defective insulation of the wires and appliances attached

2131A.885

Grand Jury,
Cook County.

STATE OF ILLINOIS,
County of Cook.
In the Circuit Court of Cook County.
The People of the County of Cook,
Plaintiff,
vs.
The People of the County of Cook,
Defendant.

IN SENATE
JANUARY 11, 1914

By this appeal it is sought to reverse a judgment for \$1,000.00 in favor of appellee (plaintiff), an administrator, against the defendant, the city of Chicago, for negligently causing the death of one Joseph Harold, plaintiff's intestate. Suit was originally brought against the city of Chicago and several other defendants jointly. The latter, however, were dismissed out of the case at the plea of plaintiff's discharge.

It appears that on the evening of April 11, 1914, plaintiff's intestate, a boy of eighteen, was found lying near the corner of LaSalle street and Chicago street. He was removed to a hospital, where an examination revealed, among other things, that he had suffered an electric shock. Death ensued shortly thereafter.

The negligence charged was the maintenance of a certain iron pole located at the northeast corner of the LaSalle street, from the top of which an electric wire hanging to defendant was suspended, which said pole, it was alleged, had become charged with electricity because of defective insulation of the wire and appliances attached

thereto.

Although several points are relied upon by defendant for a reversal, we deem it necessary to consider but one of them, viz., whether or not the verdict is clearly and manifestly against the weight of the evidence.

Two Alleged eye-witnesses testified on behalf of plaintiff, - one Scomo and one Sacco.

The witness Scomo stated that on the evening of the accident, he, in company with the said Sacco, were about four steps from the said post on the corner in question; that he saw plaintiff's intestate standing alone near the said post and then fall into the street. On cross examination the witness testified that there were several people walking around the said corner when he and Sacco reached there, and that plaintiff's intestate fell before they reached the place.

Sacco testified that he saw plaintiff's intestate standing about a step from the said iron post at the time and place in question; that he put his hand on the post and fell into the street; that he (the witness) and Scomo were about twenty steps away from the said post when they first noticed people around it.

The evidence introduced on behalf of defendant showed that on the evening referred to, between seven-thirty and eight o'clock, plaintiff's intestate was in the crossing observation tower of the Chicago, Milwaukee & St. Paul Railway, located on the northwest corner of the aforesaid streets; that the tower-man, one James McDonald, who was a friend of plaintiff's intestate, observed that the lamp located on the opposite corner was not lit, which fact he mentioned to plaintiff's intestate, who thereupon started down from the tower, saying

although several points are raised upon by defendant

for a verdict, we deem it necessary to consider but one of them, whether or not the verdict is clearly and manifestly

against the weight of the evidence.

Two alleged circumstances testified on behalf of

plaintiff - one from the witness.

The witness stated that on the evening of the

incident, he, in company with the said Sacco, were about four

blocks from the post on the corner in question; that he saw

plaintiff's intestate standing alone near the said post and then

fall into the street. On cross examination the witness testified

that he saw several people walking around the said corner

and that he saw Sacco running there; and that plaintiff's intestate

fell before they reached the corner.

Good testified that he saw plaintiff's intestate

standing about a block from the said post at the time and

place in question; that he put his hand on the post and fell

back the street; that he (the witness) and Sacco were about

four blocks away from the said post when they first noticed

people around it.

The evidence introduced on behalf of defendant shows

that on the evening referred to, between seven-thirty and eight

thirty, plaintiff's intestate was in the crossing operation

area of the Chicago, Milwaukee & St. Paul Railway, located

on the northeast corner of the aforesaid street; that the

townsman, one James McDonald, who was a friend of plaintiff's

intestate, observed that the key located on the opposite

corner was not set, which fact he was shown to plaintiff's

that he was going over to light or fix it; that shortly thereafter the said McDonald saw him lying on the sidewalk, about three feet from the iron pole already referred to; that there was nobody in the vicinity at that time; that he (McDonald) went over and started to work the arms of plaintiff's intestate, to restore consciousness; that blood was issuing from his mouth and nose; that upon examination it was found that the inside of the fingers of both hands was severely burned, as was also one foot and one wrist; that there was a bruise on the back of the head, as if caused by a fall.

Defendant showed further by the undisputed testimony of numerous witnesses, including the electric light repairman of the defendant, - all men of long experience and versed in matters pertaining to electrical construction - that the said iron pole, immediately after the accident, was not charged with electricity, and that the wires, lamp, bracket, insulation and all appliances attached to said pole, were free from defects of any kind whereby the pole might have become charged with an electric current, and that they remained in such condition for several years without alteration; that shortly after the accident two of the said witnesses climbed the pole to which said arc lamp was attached, without receiving an electric shock, and discovered that the carbons in said lamp were improperly adjusted, for which reason it would not light. One of these witnesses also testified that on the day following the fatality he made a further examination of the pole and lamp in question, and discovered finger prints on the shade of the lamp.

In view of all the foregoing undisputed evidence, it is inconceivable that the pole in question could have been charged with electricity at the time plaintiff's intestate was injured and been free therefrom immediately afterwards, if any

That he was going over to light on the 11; that shortly there-
after the said defendant saw him lying on the sidewalk, about
three feet from the iron pole already referred to; that there
was nobody in the vicinity at that time; that he (defendant)
went over and started to work the arm of plaintiff's intestate,
to cause him to rise; that blood was issuing from his mouth
and nose; that upon examination it was found that the inside
of the fingers of both hands was severely burned, as was also
one foot and one wrist; that there was a bruise on the back
of the head, as it seemed by a fall.
Defendant showed further by the unimpaired testimony
of numerous witnesses, including the electric light inspectors
at the time, - all men of long experience and sound in-
tellect, that the said
iron pole, immediately after the accident, was not changed with
electricity, and that the wires, lamp, bracket, insulator and
all appurtenances attached to said pole, were torn from between of
any kind whereby the pole might have become charged with an
electric current, and that they remained in such condition for
several years without alteration; that shortly after the
accident two of the said witnesses climbed the pole to which said
iron pole was attached, without receiving an electric shock, and
testified that the conductors in said lamp were improperly
adjusted, for which reason it would not light. One of these
witnesses also testified that on the day following the fatal
he made a further examination of the pole and lamp in question,
and discovered larger burns on the inside of the lamp.
In view of all the foregoing undisputed evidence, it
is inconceivable that the pole in question could have been
charged with electricity at the time plaintiff's intestate was
injured and been free from electric shock afterwards, it may

of the appliances or equipment attached thereto were defective as charged in the declaration. The only reasonable hypothesis of the cause of the fatality is, that plaintiff's intestate ascended the pole for the avowed purpose of fixing the lamp and was electrocuted while attempting to do so. We are therefore constrained to hold that the verdict is clearly and manifestly against the weight of the evidence.

Accordingly the judgment must be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

...the evidence against the weight of the evidence.

1. The Government of the United States of America, by and through the Department of State, has the honor to acknowledge the receipt of your letter of the 10th day of March, 1944, in relation to the above-captioned matter.

WASH DC (U) 10-10-68

327 - 24254

FINDINGS OF FACTS.

This court finds as facts:

1. That the said iron pole, and the electric arc lamp, bracket, wiring, insulation, and all appliances attached thereto, were in a good state of repair, at and prior to the time of the said accident.

2. That the defendant, the city of Chicago, was free from any negligence in connection with said fatality.

1947

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

positive attitudes to the new technology, public demand, and

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

1941-1942

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

From this we conclude that the

337 - 24264

SOPHIE WENDELL,
Appellee,

vs.

ISRAEL LANSKI and
SAMUEL LANSKI,
Appellants.

213 I.A. 686

Appeal from

Superior Court,

Cook County.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT..

Appellants, as owners of the equity of redemption in certain real estate, petitioned the court for an order on the receiver theretofore appointed in a foreclosure proceeding, to turn over to them the rents, issues and profits arising therefrom, and to discharge said receiver:

From the order denying the relief sought in said petition, this appeal is prosecuted.

The trust deed forming the basis of the aforesaid foreclosure proceeding, in addition to conveying the property in question, expressly pledged the rents, issues and profits thereof for the payment of the debt secured thereby, and provided further that in case of default in the payment thereof, upon the filing of a bill to foreclose the said trust deed, the court was empowered to appoint a receiver for the benefit of the legal holder or holders of the notes evidencing the indebtedness secured by said trust deed, to collect the rents, issues and profits arising therefrom during the pendency of such foreclosure suit and until the expiration of the period of redemption.

The bill to foreclose said trust deed, after setting forth inter alia the foregoing provisions thereof, prayed for a foreclosure of the premises and for the appointment of a

SI 31.A. 688

Appeal from
Superior Court,
Good County.

IN SENATE, FEBRUARY TWENTY-NINE, 1904.
REPORT OF THE COMMISSIONER OF THE LAND OFFICE.

Whereas, an owner of the equity of redemption in
certain real estate, petitioned the court for an order on the
petitioner's behalf to be appointed in a foreclosure proceeding, to
take over to them the rents, issues and profits arising there-
from, and is likewise well known;

That the order denying the relief sought in said
petition, this appeal is presented.

The trust deed forming the basis of the foreclosure
proceedings proceeding, in addition to conveying the property
in question, expressly pledged the rents, issues and profits
arising from the payment of the debt secured thereby, and
provided further that in case of default in the payment there-
of, upon the filing of a bill to foreclose the said trust
deed, the court was empowered to appoint a receiver for the
rents of the legal holder or holders of the notes evidencing
the indebtedness secured by said trust deed, to collect the
rents, issues and profits arising therefrom during the pendency
of such foreclosure suit and until the expiration of the period
of redemption.

The bill to foreclose said trust deed, after setting
forth in detail the foregoing provisions thereof, prayed for

receiver to collect the rents, issues and profits arising therefrom, in accordance with said provisions.

After the filing of the said bill and prior to the entry of the foreclosure decree therein, a receiver was appointed on petition of the complainants therein.

Appellants purchased the said property subject to the foregoing trust deed, but did not assume the indebtedness secured thereby; and there is no deficiency decree against them, although one was entered against the original obligors.

The foregoing provisions of the said trust deed regarding the pledging of the rents, issues and profits for the payment of the debt, and the right to have a receiver appointed to collect same during the redemption period, were not incorporated in the decree of foreclosure and sale.

The sole question here presented for determination is whether or not under the aforesaid circumstances appellants are entitled to the rents, issues and profits arising from said property during the period of redemption.

It is insisted by appellants that inasmuch as the trust deed became merged in the decree of foreclosure the judgment creditor, by failing to incorporate therein the aforesaid provisions of the trust deed waived his right to the rents, issues and profits, as against them.

This contention ignores the express provisions of the deed itself, which not only created a lien upon said rents, issues and profits, but prescribed the manner of its enforcement as well, viz., by the appointment of a receiver to collect same during the pendency of the foreclosure suit and until the expiration of the redemption period; and the order appointing the receiver was but the enforcement of the

1887
receiver to collect the rents, issues and profits arising there-
from, in accordance with said provisions.

After the filing of the said bill and prior to the

entry of the foreclosure decree therein, a receiver was

appointed on petition of the complainant therein.

Appellant purchased the said property subject to

the mortgage trust deed, but did not assume the indebtedness

secured thereby; and there is no delinquent decree against

him, although one was entered against the original obligor.

The foregoing provisions of the said trust deed re-

pecting the pledging of the rents, issues and profits for the

payment of the debt, and the right to have a receiver appointed

in default of such payment during the redemption period, were not inas-

much as in the decree of foreclosure and sale.

The sole question here presented for determination

is whether or not under the aforesaid circumstances appellant

was entitled to the rents, issues and profits arising from said

property during the period of redemption.

It is insisted by appellant that inasmuch as the

trust deed became merged in the decree of foreclosure the

appellant creditor, by failing to incorporate therein the

aforesaid provisions of the trust deed waived his right to

the rents, issues and profits, as against them.

This contention ignores the express provision of

the said decree, which not only created a lien upon said

rents, issues and profits, but prescribed the manner of its

enforcement as well, viz., by the appointment of a receiver

to collect same during the pendency of the foreclosure suit

and until the expiration of the redemption period; and the

order appointing the receiver was not the enforcement of the

said lien, in conformity therewith. Consequently there was no necessity for incorporating said provision in the decree of foreclosure. But even in the absence of such prior order, the court might properly have appointed a receiver to collect such rents, issues and profits to satisfy the deficiency decree.

First Natl. Bank v. Ill. Steel Co., 174 Ill. 140.

Accordingly the decree will be affirmed.

AFFIRMED.

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China. This has been due to the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China.

360 - 24287

ERNEST RECKITT and HAROLD
BENNINGTON, copartners,
as Ernest Reckitt & Company,
Appellees,

vs.

WILLIAM J. DUNN et al.,
Appellants.

361 - 24288

WILL H. DILG ADVERTISING
COMPANY, a corporation,
Appellee.

vs.

WILLIAM J. DUNN et al.,
Appellants.

213 I.A. 686

APPEALS FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Appellants, as officers, agents and directors of the Eagle Film Manufacturing Company, a corporation for profit, organized under the laws of the State of Delaware, and now defunct, were held personally liable for certain indebtedness incurred in this State, in the name of said corporation, because of its failure to obtain a license to do business in the State of Illinois.

Separate suits were filed by appellees in the court below, - one by the Dilg Advertising Company for certain advertising furnished in connection with a stock-selling campaign conducted on behalf and in the name of said corporation, and the other by Reckitt & Company, for auditing its books of account.

By stipulation of the parties, the cases were consolidated for hearing and were tried before the court without a jury, with the result already stated.

SI 31.A. 686

AMERICAN TRUST
NATIONAL BANK

MR. BRUCE W. BROWN, JUDGE
DELIVERED THE OPINION OF THE COURT.

Appellants, an officer, agents and directors of the
said The Manufacturing Company, a corporation for profit,
appears under the laws of the State of Delaware, and now
before, were held personally liable for certain indebtedness
incurred in this State, in the name of said corporation, be-
cause of its failure to obtain a license to do business in
the State of Illinois.
Separate suits were filed by appellants in the court
below, - one by the said Advertising Company for certain
advertising furnished in connection with a stock-selling
business conducted on behalf and in the name of said corporation,
and the other by Rockitt & Company, for assisting the books of
the said corporation.
By stipulation of the parties, the cases were
consolidated for hearing and were tried before the court without
a jury, with the result already stated.

The said Eagle Film Manufacturing Company was chartered to do a general motion picture business. It maintained the requisite office in the State of Delaware, but its main office was in the city of Chicago, where its film production plant was also located until the early part of the year 1916, when it was removed to Jacksonville, Florida.

But two material questions are here presented for determination, viz., whether or not the said corporation was doing business in the State of Illinois, within the meaning of our statute; and if so, whether or not appellants are personally liable to appellees.

The evidence discloses that the said Eagle Film Manufacturing Company produced films, sold its stock, maintained its principal office from which the business was directed, held its stockholders' and directors' meetings, conducted an advertising campaign to stimulate the sale of its stock, engaged and paid performers, ordered an audit of its books, - in fact, did practically everything it was authorized by its charter to do, from the Chicago office.

In People v. C. I. & L. Ry. Co., 223 Ill. 581, our Supreme court, in passing upon a similar question, held that the words, "doing business in this State," mean doing the business or character of business for which the corporation was organized.

We think there can be no question that the said Eagle Film Manufacturing Company's said acts constituted "doing business" within the meaning of the statute.

As to the second question; the evidence shows that a meeting of the stockholders and directors of said corporation was held in Chicago for the purpose of having an audit of the company's books made. An audit was there authorized by a majority of the stockholders and directors, including the

The said Eagle Film Manufacturing Company was organized
as a general motion picture business. It maintained the
regional office in the State of Indiana, but its main office
was in the city of Chicago, where the film production plant was
also located until the early part of the year, 1916, when it was
transferred to Indianapolis, Indiana.

The two principal questions are here presented for
consideration, viz., whether or not the said corporation was
properly organized in the State of Indiana, within the meaning of
the statute; and if so, whether or not its officers and directors
acted in compliance.

The Indiana Statute (Act No. 221, 1915) provides that
the Eagle Film Manufacturing Company, organized in the State of Indiana,
its principal office from which the business was directed, held
its stockholders' and directors' meetings, conducted an adver-
tising campaign to stimulate the sale of its stock, engaged and
paid for the same, ordered an audit of its books, - in fact, did
practically everything it was authorized by the charter to do,
in the State of Indiana.

In January, 1916, the Indiana Supreme Court, in the case of
Eagle Film Manufacturing Company v. State, held that the
said corporation, in passing upon a similar question, held that the
said "motion picture business in this State," meant doing the business
of manufacture of pictures for which the corporation was organized.
We think there can be no question that the said Eagle
Film Manufacturing Company's said acts constituted "doing
business" within the meaning of the statute.

As to the second question, the evidence shows that a
meeting of the stockholders and directors of said corporation
was held in Chicago for the purpose of having an audit of the
company's books made. An audit was there authorized by a
majority of the stockholders and directors, including the

appellants. It was later decided to conduct a stock-selling campaign in order to raise funds for the said corporation. To this latter project appellants not only consented but contributed money for the purpose of carrying it on.

Whether or not appellants were aware that specific contracts had been awarded in connection with the audit of the corporate account books and the advertising campaign, is immaterial, they having previously authorized the expenditure of money for such purpose.

We conclude, therefore, that the court properly entered the judgments herein complained of. Ryersen & Son v. Shaw, 277 Ill. 524.

Accordingly the judgments will be affirmed.

AFFIRMED.

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PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

vs.

EDWARD BRODIE,
Plaintiff in Error.

213 I.A. 686

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, Edward Brodie, seeks the reversal of a judgment declaring him to be a vagabond and sentencing him to serve a term of three months in the house of correction.

The information upon which defendant was tried and convicted, charged that on the 23rd day of January, A. D. 191_, in the city of Chicago, said defendant was an idle and dissolute person, etc.

It is insisted that the said information is fatally defective in that the defendant is therein alleged to have been an idle and dissolute person in the year 191_, an impossible date.

The precise question here presented was passed upon in the case of People v. Weiss, 168 Ill. App. 502, wherein the court held void an information similarly defective in failing to state that the offense charged was committed within the statutory period of limitations. We concur in the conclusion therein reached, for the reasons therein stated.

For the reason assigned the judgment must be reversed.

REVERSED.

ST. I. A. 688

ORDER TO

OF CHICAGO.

By this writ of error defendant, Edward Brodie, seeks the reversal of a judgment adjudging him to be a vagrant and committing him to serve a term of three months in the house of correction.

The information upon which defendant was tried and convicted, charged that on the 22nd day of January, A. D. 1911, at the City of Chicago, said defendant was an idle and dissolute person, etc.

It is insisted that the said information is fatally defective in that the defendant is therein alleged to have been an idle and dissolute person in the year 1911, an impossible

The precise question here presented was passed upon in the case of People v. Jones, 124 Ill. App. 502, wherein the court held void an information similarly defective in failing to state that the offense charged was committed within the statutory period of limitation. No dissent in the conclusion was reached, for the reasons therein stated.

For the reason assigned the judgment must be

89 - 24392

213 I.A. 686

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

JOHN FAHY,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, John Fahy, seeks the reversal of a judgment declaring him to be a vagabond, under sec. 270 of the Criminal Code, ch. 38, Hurd's R. 3. of Ill., and sentencing him to serve a term of six months in the house of correction.

The chief contention made by the defendant is that the evidence does not sustain the verdict and judgment.

On behalf of the prosecution there were numerous witnesses, all of whom were police officers of the City of Chicago.

The witness Burke testified that he arrested defendant on a crowded northbound Halsted street car on April 8, 1918, at 6:30 in the morning; that the defendant was crowding the passengers on the rear platform of the said car; that he took defendant off the car and asked him if he was working, to which defendant replied in the negative and explained that he had just returned from Hot Springs; that when arrested, the defendant was in company with one Brophy.

The witness O'Connor testified that he saw defendant on the morning in question, in charge of the said Burke, who had him under arrest; that he (the witness) said to defendant, "You ought to be ashamed, robbing these poor working men out here so early in the morning," to which defendant replied,

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"You know I don't rob these working stiffs; I was going down town to make the depot;" that when later asked what he was doing out there so early in the morning, defendant replied, "We were out playing cards all night," that on the morning in question he arrested the said Brophy, (defendant's companion) whom he knew to be a pickpocket and who had no lawful means of employment; that he had known defendant for upwards of five years, during which period defendant had been extradited from another State for stealing an automobile.

The witness Grattan testified that he had known defendant for several years; that he first became acquainted with him in company with two others whom he knew to be pickpockets; that he saw defendant on numerous occasions prior to the time of his arrest by the said Burke; that he asked defendant on the afternoon of February 23, 1917, whether or not he was employed, to which defendant replied that he was not, whereupon he arrested defendant; that he again accosted defendant on the afternoon of May 11, 1917, when defendant again admitted that he was not employed; that a similar occurrence took place on a street car on July 25, 1917, when defendant again told the witness that he was not employed; that on August 19, 1917, he again saw defendant in company with three men whom he knew to be pickpockets, at which time defendant admitted that he was not employed; that he again saw defendant in company with one August Zander, whom he knew to be a burglar, at which time defendant again admitted that he was not working; that he again questioned defendant on October 19, 1917, between the hours of three and five o'clock in the afternoon, when defendant admitted not being employed; that on October 22, 1917, he again accosted defendant in the afternoon, in a poolroom and again asked defendant if he was

... I was going down
... that then later when he was
... there as early in the morning, defendant replied,
"We were out playing cards all night," then on the morning in
question he arrested the said Murphy, (defendant's companion)
... to him to be a policeman and who had no lawful means of
employment; that he had known defendant for upwards of five
years, during which period defendant had been associated from
... in a law office in automobile.
... that he had known
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... that he saw defendant on numerous occasions prior to
... the line of his arrest; the said Murphy, that he asked
... on the afternoon of February 23, 1917, whether or not
... he was employed, to which defendant replied that he was not,
... defendant he arrested defendant; that he again contacted
... on the afternoon of May 11, 1917, when defendant
... again admitted that he was not employed; that a student
... took place on a street car on July 20, 1917, when
... again told the witness that he was not employed;
... on August 10, 1917, he again saw defendant in company with
... when he knew to be policeman, at which time
... admitted that he was not employed; that he again saw
... in company with one August Landay, when he knew to be
... at which time defendant again admitted that he was
... that he again contacted defendant on October 12,
... between the hours of three and five o'clock in the
... when defendant admitted not being employed; and
... on October 22, 1917, he again contacted defendant in the
... in a poolroom and again asked defendant if he was

employed, to which defendant again replied in the negative; that on the last mentioned occasion defendant complained that he was being "picked on;" whereupon the witness informed defendant, "As long as you don't find work I am going to keep on locking you up." The witness also testified to several subsequent occasions on which he accosted defendant during the day at various places, such as saloons and poolrooms, in company with well known criminals, at which times the defendant invariably admitted not being employed; that during his acquaintance with defendant he had never known him to have any lawful means of employment, and that he associated with thieves and pickpockets, and was an habitue of places frequented by criminals.

The testimony of the witness Allenhoven was to the effect that he had known defendant for several years, during which period he had frequently seen him in company with well known criminals, and in places frequented by such characters; that to his knowledge defendant had no lawful means of employment during his acquaintance with him.

The witness McCambridge testified that he had known defendant for a number of years; that he arrested defendant at two o'clock in the morning on September 25, 1912, at Van Buren and State streets in the city of Chicago, at which time the witness and another police officer saw defendant jump off a street car pursued by another man who shouted, "Thief, thief," whereupon the witness captured and arrested defendant; that thereafter defendant was found guilty of larceny and sentenced to serve sixty days imprisonment.

The witness Kane testified that on July 28, 1917, defendant was arrested for picking a man's pocket on an interurban car; that defendant was charged with larceny, but

...to which defendant again replied in the negative;
and in the last mentioned occasion defendant complained that
he was being "picked up"; whereupon the witness informed
him that "as long as you don't mind work I am going to keep
you looking for it." The witness also testified to several
instances of occasions on which he observed defendant during
the day at various places, such as saloons and restaurants,
staying in well known hotels, at which times the defendant
usually, although not being employed; that during his
employment with defendant he had never known him to have
any kind of means of subsistence, and that he was usually
looking for him, and was usually at home, and was usually
by himself.

The testimony of the witness McLaughlin was to
the effect that he had known defendant for several years, having
first met him in 1901, and that he was usually with him
in the city of Chicago, and in places frequented by such persons;
that in his knowledge defendant had no lawful means of
subsistence, having his maintenance with him.

The witness McLaughlin testified that he had known
defendant for a number of years; that he observed defendant
at 7 o'clock in the morning on September 20, 1912, at Van
Buren and State streets in the city of Chicago, at which time
the witness and another police officer saw defendant jump out
of a crowd and run away by another man who appeared, "That, sir,"
answered the witness, "defendant and arrested defendant; that
defendant, defendant, and found guilty of larceny and sentenced."

The witness Kane testified that on July 30, 1912,
defendant was arrested for picking a man's pocket in an
instance, that defendant was charged with larceny, and

because of the fact that the prosecuting witness who resided outside the State could not appear, defendant was allowed to plead guilty to the charge of disorderly conduct for which he was fined \$25 and costs.

The witness Broderick testified that he first became acquainted with defendant during the month of September, 1915, while riding on a street car, at which time a man complained to him that defendant, who was then alighting from said car, had placed his hand into his pocket; that the witness alighted from said car and gave pursuit and captured defendant, but that after doing so he could not find the man who had made the complaint; that when questioned at the police station defendant gave a fictitious name, but subsequently admitted his identity, after which he was turned over to the detective bureau.

The witness Crotty testified that he arrested defendant on August 8, 1917, in company with one Dave Harris, a notorious pickpocket; that when he arrested defendant on that occasion, the latter pleaded to be allowed to "fix it up", stating that he had not been given a chance; that "it cost so much for a lawyer and a bondsman and that he did not have the money." The witness also testified to other subsequent instances when he arrested defendant, and stated that he knew defendant had no lawful means of employment and that he associated with thieves and pickpockets.

Opposed to the foregoing was the testimony of defendant and his brother.

Defendant's testimony may be briefly characterized as a flat denial of all of the foregoing.

Charles Fahy, defendant's brother, testified that he was in the live-stock business and that defendant was in his employ, feeding and caring for stock, and that he had been so

... the state could not appear, defendant was allowed to
... the charge of disorderly conduct for which
... and costs.
The witness further testified that at about 10:30
... during the night of December 1919,
... on a street car, at which time a man complained to
... who was then sitting in the rear car, had
... that the witness listened from
... and captured defendant, but that after
... and the man who had made the complaint;
... at the police station defendant gave a
... but subsequently admitted his identity, after
... the detective bureau.
The witness Gray testified that he arrested defendant
... in company with one Dave Harris, a notorious
... that when he arrested defendant on that occasion,
... to be allowed to "fix it up", stating that
... "it cost me much for a
... a hangman and that he did not have the money." The
... also testified to other subsequent incidents when he
... and stated that he knew defendant had no
... of employment and that he associated with known
... and his brother.
Defendant's testimony may be briefly summarized
as a flat denial of all of the foregoing.
... defendant's brother, testified that
he was in the live-stock business and that defendant was in his
employ, feeding and caring for stock, and that he had been so

employed since January, 1918. On cross examination the witness admitted that although he kept books of account, he had no record showing the employment of defendant or the amount of salary paid him. The witness ^{also} admitted having testified on behalf of defendant shortly before, when defendant was being prosecuted on a similar charge, in which he made statements regarding defendant's employment, in several material instances inconsistent with his testimony in the case at bar.

A careful examination of the evidence leads this court to the conclusion that the verdict is amply warranted. The testimony of defendant and his brother was but a feeble attempt to overcome evidence which shows beyond any possible doubt that defendant was a vagabond with no lawful means of support, on the day of his arrest.

It is also urged that the court committed reversible error in the admission of evidence, particularly in permitting the introduction in evidence of a photograph of defendant taken by the police authorities of Youngstown, Ohio, while defendant was there during the month of January, 1918; and that the verdict is not responsive to the amended information.

The said photograph does not appear anywhere in the record and hence the question of its admissibility is not before us.

As to the last contention, the verdict found defendant guilty "in manner and form as charged in the information." There can be no question that this referred to the information upon which defendant was tried, i. e. the amended one.

Other errors with respect to the admission of evidence are complained of, which we deem it unnecessary to discuss save to say that they were not of sufficient gravity to deprive defendant of a fair trial; and his guilt having

been so conclusively established by an overwhelming amount of convincing proof that the jury could not reasonably have returned a different verdict, the judgment should not be reversed for the purpose merely of making a better record.

People v. Cleminson, 250 Ill. 135; People v. Halpin, 276 Ill. 363; People v. Buckminster, 282 Ill. 177.

Accordingly the judgment will be affirmed.

AFFIRMED.

[illegible]

462 - 23607

ANNA BRUM, Administratrix
of the estate of JAMES BRUM,
deceased,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY et al.,
Appellants.

(395a)
213 I.A. 687

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$10,000 recovered on account of the death of appellee's intestate resulting from his attempt to cross in front of one of appellant's cars at the intersection of Cicero Ave. (48th St.), running north and south, and Jackson street, running east and west, in Chicago. The negligence averred and relied on was in the operation of the car, particularly in operating it at a high and dangerous rate of speed.

The car was going south on the west track of 48th street, and deceased was walking west on the north side of Jackson street. The accident took place at 7:30 P. M., December 6, 1914. It was dark and raining. The street lights were out, and the only lights at the crossing were in the drug store at its southwest corner. There was no building on any other corner, no vehicles on the street, and no obstruction in the line of vision between deceased and the approaching car, which was lit up by a headlight and lights inside of it. Witnesses to the accident on each side of Jackson street at the intersection saw and plainly heard the approaching car a block away. As to its speed, whether its gong was sounded, and whether deceased looked up at any time

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B.I.A. 687

This is an attempt to find a link between the \$10,000 reward on account of the death of appellant's informant regarding from his attempt to prove to them of one of appellant's acts at the intersection of Chicago Ave. (43rd St.) between north and south, and Jackson Street, running east and west, in Chicago. The witnesses asserted and related in fact in the vicinity of the act, particularly in operating it as a high and dangerous rate of speed.

The act was being made on the west bank of Chicago River, and defendant was walking west on the north side of Jackson Street. The witness took place at 7:30 P. M., December 6, 1910. It was dark and raining. The street lights were out, and the only light at the crossing were in the east above at the southeast corner. There was no building at any other corner, no vehicle in the street, and no pedestrian in the line of vision between defendant and the crossing bar, which was lit up by a headlight and light approaching at a high speed. As it too speed, without the going was made, and witness remained looking up at my claim

while walking from the east curb of 48th street to the point of collision, the testimony was conflicting.

Appellants raise no issue with respect to their negligence on this appeal, but insist that the deceased was guilty of contributory negligence upon one of two hypotheses - that either the deceased failed to look and ascertain whether the car was approaching, or, knowing of its approach, deliberately took the chances of walking in front of it on the assumption that it would be stopped or that he would have time to cross.

We need not consider the first hypothesis if there was sufficient evidence for a verdict on the theory that he did look. Two of plaintiff's witnesses in a good position to see testified positively that when deceased left the curbstone he looked both north and south and looked up again as he entered into the north bound track. If their testimony was credible, - and we find no reason for rejecting it, - then it would be difficult to understand how, in the absence of defective sight, deceased could fail to see the car, and know it was approaching. We think, therefore, the case should be considered upon that assumption.

The east curb line at 48th street is 13 feet and $4\frac{3}{4}$ inches from the east rail of the north bound track. The tracks are 5 feet $1\frac{1}{2}$ inches wide, and the distance between them is 5 feet $5\frac{1}{2}$ inches, thus making a total of about 16 feet between the outside rails of the two tracks. Excluding the distance the car overlapped the tracks deceased had about 20 feet to go when he stepped from the curb, and about 16 feet when he reached the north bound track, to get across the south bound track. The testimony is that he was walking at an ordinary gait, estimated from 3 to 4 miles an hour, and that

which was taken from the end of the street at the point of
intersection, the testimony was conflicting.

Appellants were in line with respect to their
evidence on this appeal, but that the defendant was
guilty of negligent negligence was one of two hypotheses -
that either the defendant failed to look and ascertain whether
the car was approaching, or, assuming of the approach, delivery
right into the channel of traffic in front of it on the
assumption that it would be stopped or that he would have time

to read not consider the first hypothesis as there
was sufficient evidence for a verdict on the theory that he did
look. The defendant's testimony in a good position to see
testified positively that when defendant left his apartment he
looked with care and caution and looked up again as he entered
into the street from the garage. If their testimony was credible,
- and in that he turned for looking it, - then it would be
difficult to understand how, in the absence of defective sight,
defendant could fail to see the car, and thus it was approaching.
In short, therefore, the case should be remanded upon that

The last word line of this street is 10 feet and
at the corner from the east side of the north bound track. The
distance was 5 feet 10 inches wide, and the distance between the
is 5 feet 10 inches, thus making a total of about 10 feet
between the outside rails of the two tracks. Assuming the
distance the car overtook the truck between the two
50 feet to be then he stepped from the curb, and as it is 10 feet
when he crossed the north bound track, to get across the south
bound track. The testimony is that he was walking at an
ordinary pace, estimated from 5 to 6 miles an hour, and that

the speed of the car, as estimated by most of the witnesses, was from 25 to 30 miles an hour, 8 to 10 miles as fast as deceased was walking. The witnesses do not agree as to where the car was when he stepped into the north bound track, some fixing it at the alley, 125 feet north of Jackson street, and some at Quincy street, 263 feet north of Jackson. But the evidence was such that the jury might have regarded the car as approximately 125 to 150 feet away when deceased stepped into the north bound track, and that therefore to escape a collision he had about 15 to 18 feet to go while the car was going 130 feet. From this state of facts it would seem that a collision was inevitable if the relative rate of speed was maintained.

We might agree with appellants' conclusions if the evidence was such as to indicate that the deceased unquestionably knew how near the car was and then relied solely upon the presumption that the motorman would slacken its speed, or if the evidence conclusively showed that he deliberately took chances and misjudged his ability to get across. In case of the first alternative he would have no right to rest solely on such a presumption (Schlaunder v. Chi. & So. Trac. Co., 253 Ill. 154), and in case of the other he might be deemed guilty of negligence in law, in which event no one else could be held responsible for his error of judgment. (Roberts v. Chicago Railways Co., 262 Ill. 238.) But there was no direct evidence here, as in the Schlaunder case, from which it could be said that he relied solely on such a presumption, nor circumstances such as in the Roberts case, from which it inevitably follows that the deceased concluded to take "chances" and misjudged his ability. Whether in such circumstances the deceased might

The speed of the car, as indicated by the witness,
was from 25 to 30 miles an hour, 8 or 10 miles an hour as
the witness was walking. The witness did not know as to where
the car was when he stopped into the north bound track, being
telling it at the time. The last word of the witness was
that the car was at the end of the track, 251 feet north of Jackson. The
witness was sure that the car might have passed the car
at the end of the track, 251 feet north of Jackson. The
witness was sure that the car was at the end of the track, 251
feet north of Jackson, and that therefore to escape a
collision he had about 10 or 15 feet to go when the car was
at the end of the track. From this state of facts it would seem that
a collision was inevitable if the witness had not stopped the
car.

We might agree with the witness' conclusion if the
witness was such as to indicate that the witness was walking
toward the car and then raised the car upon the
witness that the witness was walking toward the car, at 15 the
witness conclusively showed that he was walking toward the car
and stopped his car to get away. In case of the first
alternative he would have no right to stop the car on such a
premises (Hobbs v. Hobbs, 102 Ill. 2d, 102 Ill. 2d, 102 Ill. 2d).
But in case of the other he might be deemed liable if
negligent in law, in which event he also could be held
responsible for his error of judgment. (Hobbs v. Hobbs,
102 Ill. 2d, 102 Ill. 2d, 102 Ill. 2d). But there was no direct evidence
that he was negligent, from which it could be said
that he was negligent, from which it could be said
that the witness was negligent, from which it could be said
that the witness was negligent, from which it could be said
that the witness was negligent, from which it could be said

reasonably have believed that the car was such a distance from him and going at such speed that he could safely cross ahead of it was a question of fact the jury might have decided without regard to whether the conduct of deceased was dictated by such presumption or a disposition to take chances. The jury may have considered that in view of the state of the weather and the absence of street lights and the position of deceased in almost a direct line with the car's headlight, he may well have miscalculated both its proximity and speed.

But it must be recognized that in the close state of facts that there was room for appellants' contentions, and therefore that they were entitled to an instruction embodying their theories. One presenting the theories we have discussed was refused. It reads:

"4. The court instructs you as a matter of law that if you believe, from the evidence, under the instructions of the court, that when the deceased started to cross the street on the occasion in question - if you find that he did so - he saw the street car approaching and knew that said car was coming at such a rate of speed that he could not cross said tracks without being struck by said car, unless said car should be stopped or slackened in speed, and that with such knowledge - if he had such knowledge - he deliberately took the chances of crossing said track in safety, then plaintiff can not recover" etc.

It is not denied that this instruction states the law. (Chicago Union Trac. Co. v. Jacobson, 217 Ill. 404.) As stated in the case cited "the hypothesis of fact was such that the act would be negligence as a matter of law."

But appellees contend (1) that there was no basis for the hypothesis, and (2) that the instruction was covered by one that was given. That the hypothesis stated was inferable from the evidence and therefore justified as the basis of an instruction can hardly be questioned. No direct evidence was necessary to support it. It was properly

...have believed that the law was such a distance from

and being at such a point that no doubt could arise about

it was a question of fact the jury might have decided without

regard to whether the amount of damages was dictated by such

circumstances or a disposition to take chances. The jury may have

concluded that in view of the state of the weather and the

absence of street lights and the position of the vessel in almost

a direct line with the city's headlights, the ship could have seen

...with its proximity and speed.

But it must be recognized that in the close state of

facts there were some "speculative" questions, and

perhaps that they were entitled to an instruction emphasizing

their function. On presenting the theories we have discussed

...it would.

"1. The court instructed the jury in a matter of law

that at the time of the collision, the vessel, which was

underway, was not negligent, and that the vessel, which was

underway, was not negligent, and that the vessel, which was

underway, was not negligent, and that the vessel, which was

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underway, was not negligent, and that the vessel, which was

It is not denied that this instruction stated the

law. (United States v. ... 111, 112.)

It is stated in the case cited "the hypothesis of fact was that

that the vessel was negligent as a matter of law."

Has objection content (1) that there was no basis

for the hypothesis, and (2) that the instruction was covered

by what was given. That the hypothesis stated was

inferred from the evidence and therefore entitled as the

basis of an instruction was hardly in question. As almost

evidence was necessary to support it. It was properly

inferable from the circumstances. As the instruction gave the law applicable to a state of facts there was evidence tending to support, and presented the main theory of the defense, appellants were entitled thereto unless it was otherwise covered. Instruction 15 is referred to by appellee as covering such theory. Following a statement of the rule respecting the burden of proof as to the exercise of ordinary care by deceased the instruction states that if "by using his faculties with ordinary and reasonable care in looking out for danger after he started to cross the street in question and before he got upon or near the car track in a position of danger, he could have avoided injury on the occasion in question and that he negligently failed to do so and therefore contributed to his injury, then the plaintiff cannot recover." There is a marked difference between the two instructions. The latter submitted the question whether the deceased by using his faculties, etc., could have avoided injury, while the refused instruction submitted the question whether he knew the car was coming at such a rate of speed that he could not safely cross the tracks, unless it was stopped or slackened, and then deliberately took the chances of crossing in safety. Instruction 15 was an abstract general instruction as to the duty of deceased, and instruction 4 was one applying the law to a specific state of facts relied on by defendant to relieve it from liability. As said in Chicago City Ry. Co. v. O'Donnell, 208 Ill. 267, with reference to a similar instruction, "the matter there presented was the chief ground of defense, and should have been submitted by the instruction offered." (See also C. & E. I. Ry. Co. v. Fowler, 234 Ill. 619; Carlin v. Grand Trunk & Western Ry., 243 Ill. 64.) We think, therefore, it was reversible error not to give this instruction. We find no other reversible error and,

inference from the circumstances. As the instruction gave the
law applicable to a state of facts there was evidence tending
to support, and sustained the main theory of the defense.
The instruction was entitled thereto unless it was otherwise
stated. Instruction 18 is referred to by appellee as covering
the theory. Following a statement of the rule respecting the
burden of proof as to the exercise of ordinary care by deceased
the instruction states that it "by using his faculties with ordi-
nary and reasonable care in looking out for danger after he started
to cross the street in question and before he got upon or near
the car track in a position of danger, he could have avoided
injury on the occasion in question and that he negligently
failed to do so and therefore contributed to his injury, then
the plaintiff cannot recover." There is a marked difference
between the two instructions. The latter submitted the question
whether he deceased by using his faculties, etc., could have
avoided injury, while the former instruction submitted the
question whether he knew the car was coming at such a rate of
speed that he could not safely cross the tracks, unless it was
stopped or slackened, and then deliberately took the chance
of crossing in safety. Instruction 18 was an abstract general
instruction as to the duty of deceased, and instruction 4 was
applying the law to a specific state of facts relied on by
the plaintiff to relieve it from liability. As said in Chicago
City Ry. Co. v. O'Donnell, 208 Ill. 287, with reference to a
similar instruction, "the matter there presented was the chief
ground of defense, and should have been submitted by the
instruction offered." (See also G. & N. I. Ry. Co. v. Egan,
224 Ill. 619; Carlin v. Grand Trunk & Western Ry., 203 Ill.
64.) We think, therefore, it was reversible error not to
give this instruction. We find no other reversible error and

therefore, deem it unnecessary to discuss any other points raised by appellants. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

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167 - 24088

JAMES ADAMS, Trading as
Adams & Company,
Appellee,

vs.

MORRIS FRISCH and PAULINE
FRISCH,
Appellants.

213 I.A. 687

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee sued appellants to recover \$200.00 as agreed commissions for his services as a broker in procuring at the latter's request a customer, ready, willing and able to carry out a contract for an exchange of real estate he negotiated between them. The customers were one Hirsch and his wife who agreed to convey their property subject to certain specified incumbrances which did not include a judgment lien thereon. After futile efforts otherwise to satisfy appellants with respect thereto plaintiff, as stated in his testimony, obtained a release of the judgment and then sought to have appellants close the transaction. While appellants urge that his testimony that the judgment was released amounted to a mere conclusion, yet he swore to it as a fact and it was apparently accepted as such, there being no objection to the testimony and no evidence to the contrary. Plaintiff, therefore, having removed within the limit of time fixed by the contract the only objection defendant made to the title, he performed his part of the contract and was entitled to his commission unless, as appellants claim, it was not payable until the deal was consummated by an exchange of deeds. Plaintiff denied that there was any such arrangement. The contract provided that the payment of commissions should be made by the respective

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parties to it "as heretofore agreed by them." Plaintiff testified that no particular time for payment of them was specified. If so, he unquestionably was entitled to his commissions when he procured a party ready, willing and able to carry out the contract according to its terms, and defendant failed to comply therewith. It is unnecessary to cite authorities on such a well established proposition.

To be sure there is a flat contradiction in their testimony as to when the commission was to be paid. We think, however, the court was justified in accepting plaintiff's version of that matter, especially in view of evidence disclosing a manifest purpose on the part of defendants to find a pretext for getting out of the deal. Not only did they fail, on one excuse or another, to meet appointments made for the purpose of closing the transaction, but as a defense to the action Morris Frisch claimed that he told plaintiff the deal must be closed August 5, and that he declared it off because not closed at that time. But neither plaintiff nor the parties to the contract were in default at that time. The only objection defendants made up to that time was as to said judgment lien, and as the time for removing it did not expire under the contract until September 4th, before which time the release as aforesaid was obtained, defendant had no valid ground for declaring the deal off on August 5. Besides he made appointments on a later date to close it. We think the judgment should be affirmed.

AFFIRMED.

ROSE ADLSTEIN, Appellee,

vs.

HENRY C. GINSBERG, Appellant.

213 I.A. 687

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$200 in favor of appellee (plaintiff below) in a personal injury case. Several points are relied on for reversal, but the case will be disposed of on the ground that the evidence clearly shows that plaintiff was guilty of contributory negligence, and that defendant did not, as alleged in the declaration, own and control the leased apartment.

Conceded facts are these:

Plaintiff at the time of the accident was living with her mother who held an apartment under a month to month tenancy. While she was abed in one of its rooms some loose plaster fell on her from the ceiling, causing the injuries complained of. The ceiling was becoming more and more dangerous from the sagging of the plaster and plaintiff was fully cognizant of its condition. At the time her mother moved into the apartment she noticed that the ceiling was cracked in several places clear across the room and that where cracked it was lower than the other part of the ceiling. She was absent from the premises about two months but noticed on her return that it was looser than before she left, that the cracks were larger and more numerous, and that the plaster was loose and hanging or sagging low from the laths. Nevertheless, she did what was entirely unnecessary and dangerous, retired in a bed placed

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AMERICAN
COUNTY
COURT

This is to certify that on the 1st day of June 1900, at the County of ... State of ...
I, the undersigned, being a Justice of the Peace for the County of ... State of ...
do hereby certify that the within and foregoing is a true and correct copy of the ...
as the same appears from the records of the County of ... State of ...

Witness my hand and seal of office at the County of ... State of ...

Plaintiff at the time of the accident was living
with her mother who sold an apartment under a lease of ...
... While she was living in one of the rooms near ...
... on her from the ceiling, causing the ...
... of the ceiling was ...
... from the ceiling of the ...
... of the ...
... into the apartment and ...
... in several places ...
... it was found that the ...
... she was ...
... on her return that it was ...
... that the ...
... and the ...
... from the ...

immediately under the ceiling, whose condition was perfectly patent. One of her witnesses testified that even before plaintiff went away "it looked as though it was going to fall down any minute." It is too plain a proposition for discussion that under such circumstances plaintiff could not recover even from the landlord upon the theory that he promised to make repairs.

But the evidence clearly shows that appellant was merely an agent of the owner and acted only in that capacity, in leasing the premises to plaintiff's mother and in collecting the rent, and, therefore, did not own or control the building, as alleged in the declaration. It is plain, too, that no personal liability was imposed upon him even if he made a promise to make repairs, as claimed by plaintiff. Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

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FINDING OF FACT.

We find appellee Rose Adelstein was guilty of contributory negligence whereby she sustained the injuries complained of, and that appellant Henry C. Gieseke did not own and control the building or flat referred to in the declaration.

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1900-1901

207 - 24130

JOHN PETROWSKY, Appellee,

vs.

ALEX BERTULES, Appellant.

213 I.A. 687

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Petrowsky, plaintiff below, sued for \$300, which he claims he advanced to defendant by way of loan. Defendant denied borrowing the sum and claimed that the \$300 was given in payment of a balance due on a note from plaintiff to him. The testimony was conflicting, each of the parties producing two witnesses to the transaction of the delivery of the \$300, differing, however, as to whether the note was surrendered at that time and as to what was then said. The case was tried before the court without a jury, and from a review of the evidence we could not say that the finding of the court was clearly against its preponderance if permitted to consider it. But whatever might be our view we cannot consider the evidence, for appellee has moved to strike from the record the so-called bill of exceptions because the original instead of a copy has been improperly incorporated into the record (Marshall Field & Co. v. Eymen, 285 Ill. 306) and the motion must be granted. As this leaves nothing but the common law record and the errors assigned are wholly predicated on the part so stricken the judgment will have to stand.

AFFIRMED.

780 .A.1315

...the fact that the defendant was not a resident of the State of New York at the time of the commission of the crime, and that the crime was committed in the State of New York, the court held that the defendant was not liable for the crime. The court further held that the defendant was not liable for the crime because the crime was committed in the State of New York, and the defendant was not a resident of the State of New York at the time of the commission of the crime.

216 - 24140

THOMAS J. JONES, Administrator
of the estate of JOHN BURKHARDT,
deceased,

Appellee,

vs.

HATTIE LENNARTZ and CHARLES
BURKHARDT,

Appellants.

213 I.A. 687

APPEAL FROM

PROBATE COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree of the Probate Court of Cook County ordering the sale of real estate to pay the decedent's debts on the petition of the administrator of his estate, which included the widow's award amounting to \$900.

Appellants are the only heirs and next of kin to deceased and appear to have filed an answer, but it is not in the record. They contend here that the court was without jurisdiction to enter the decree as to parties defaulted at the term it was entered, and that the court could not enter such decree free from the widow's dower.

As to the latter point we find nothing in the statute making it compulsory to assign dower in such a proceeding, and nothing in the record which suggests that the question was raised below. Besides the cases of Oettinger v. Specht, 162 Ill. 179, and Kenley et al. v. Bryan, 110 id. 652, seem to be decisive of the question.

The claim of want of jurisdiction is grounded on the facts that the summons was returnable to and the decree entered in, a term of court beginning Monday, October 1, and that service of the parties defaulted for want of appearance was made Friday, September 21. The contention is that under

the provisions of our statutes (Chap. 131, sec. 1, par. 11, and Chap. 100, sec. 6, Hurd's R. S.) the Sunday falling on September 30 should have been excluded in computing whether service of the summons was had "10 days before the return day thereof," thus leaving less than ten days. The same point was made in Bowman v. Wood, 41 id. 203, where summons was served on the 22nd day of September and the court convened at its next term on Monday, the 2nd day of October, and the court, held in accordance with the uniform practice that the service was in proper time and sustained a judgment by default.

Appellant also urges that the decree is erroneous in not finding the value of the premises, citing Mueller v. Conrad, 178 id. 276. But that was a case where the premises were sold subject to the homestead estate while in the case at bar the widow consented to the sale free from the homestead. The decree will be affirmed.

AFFIRMED.

[illegible]

Applicants also allege that the decedent in 1926 was
in and during the time of the premises, during which
time, 175 10. 276. But that was a case where the
premises were sold subject to the homestead estate while
in the case of the widow concerned in the case now
before the court. The decree will be affirmed.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

299 - 24226

MARKS AARON, LOUIS AARON
and EDWARD AARON,
Appellees,

vs.

RUDOLPH SCHOEPPF,
Appellant.

2131.A. 688

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from the refusal of the court to vacate and open for retrial a judgment for \$420.00 taken by confession under a warrant of attorney embodied in a lease. Appellant also moved for leave to file an affidavit of merits and set-off, which were made the basis of a motion to vacate the judgment. The motions were made in due time and denied.

The lease demised to defendant a store on the first floor of a large two story building belonging to the lessor. It contained the usual recitals that the lessee has examined and knows the condition of the premises and has received them in good repair, and a clause exempting the lessor from liability "for any damage done or occasioned by or from * * * the bursting, leaking or running of any * * * wash stand, water closet, or waste pipe in, above, upon, or about said building or premises."

The affidavit showed that on various occasions for several months there was a leakage from a water closet and fixtures in the second story of appellees' building which came down through the ceiling on to plaintiff's property, causing much damage thereto, and that appellees, the lessors, were apprised thereof and promised to repair the same, but

negligently failed to do so, in consequence of which further leakages and damages therefrom ensued.

The basis of the court's ruling was the exemption clause aforesaid. But it has been held that such a clause does not exempt a landlord from liability for negligence, (Lewis Co. v. Metropolitan Co., 98 N. Y. Supp. 319; Lewis v. Habicht, 90 id. 349). Appellee so concedes, but contends that defendant's affidavit of merits does not sufficiently set up any affirmative act of negligence on plaintiff's part. In this we do not concur, and think the court should have opened up the judgment and allowed the offered pleadings to be filed and the case to be heard on its merits.

REVERSED AND REMANDED.

negligently failed to do so, in consequence of which further
losses and damages resulted.

The basis of the court's ruling was the exemption
clause stated. But it has been held that such a clause does
not exempt a landlord from liability for negligence, (Lewis Co.
v. International Bk., 22 N. Y. Supp. 219; Lewis v. Hallock, 90
N. Y. 147). Appellee so contended, but contends that defendant's
allegation of negligence was not sufficiently set up any affirmative
act of negligence on plaintiff's part. In this we do not
concur, and that the court should have opened up the judgment
and allowed the offered pleadings to be filed and the case to
be heard on its merits.

REVERSED AND REMANDED.

320 - 24247

MARY M. KENLY, executrix
of the will of WILLIAM H.
McDOEL, deceased,

Appellee,

vs.

LEWIS W. PARKER and GERTRUDE
M. B. PARKER,

Appellants.

213 I.A. 688

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit to foreclose a trust deed executed by appellants to secure notes given by appellant Lewis W. Parker, who pleaded a want of consideration. On his appeal from an adverse decree we held in our opinion filed May 1, 1917, (abstracted in 205 Ill. App. 450) that the decree cannot be disturbed as to the merits of the controversy, saying "we cannot say that the master was not justified in finding in effect that Parker's defense was not affirmatively established," but that the decree should be reversed for "other reasons," namely, for error in the computation of interest, and for taxing against Parker solicitors' fees for services in defending against a cross bill filed by third parties. We said:

"the value of the services of the solicitor in connection with the foreclosure proceedings to which appellant was a party, including those rendered in connection with proceedings had under appellant's cross bill, should be determined and the costs should be retaxed in conformity to the views herein expressed. * * * The decree will accordingly be reversed and the cause remanded for such proceedings as are necessary to carry out the views herein expressed."

The remanding order conformed to the opinion, which the lower court was bound to consult. (People v. Waite, 243 Ill. 156.) It seems almost too plain for discussion that the case was reversed and remanded merely to determine the amount of the

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solicitors fees and to correct the items of interest and costs. The order of reference followed the remanding order and the opinion, and thus ^{properly} limited the matters for determination.

Appellants complained because they were thus precluded from reopening the case for a retrial on its merits. As said in Prentice v. Crane, 240 Ill. 350: "A direction for further proceedings not inconsistent with the views expressed in the opinion does not permit another trial of the same issues and a different determination of them." And as said in People v. Waite, *supra*, "It is not required that specific directions shall be stated in an order reversing and remanding the cause, and it is the duty of the court to which the cause is remanded, to examine the opinion and proceed in conformity with the views expressed in it." This is manifestly what the court did.

But it is urged that it was error to allow solicitors' fees for services in connection with the proceedings had under appellants' cross bill which sought a cancellation of the trust deed, on the same matters set up in the answer, and therefore on matters that went to the very heart of the bill, namely, the right to a foreclosure. We see no reason for changing our opinion on this matter. As stated therein the trust deed provided for solicitors fees incurred in any suit or proceeding in connection with the foreclosure to which the holders of the notes might be a party, and we regarded Parker's cross bill as a proceeding in connection with the foreclosure it aimed to defeat.

So far as the right of appellant Gertrude M. B. Parker, the wife of Lewis Parker, to complain, it is enough to say that she was made a party to the proceeding merely to foreclose her equity of redemption arising in her inchoate right of dower, and no money decree was entered, or costs

The court was divided 4-3 in favor of the defendant. The majority opinion was written by Justice Brandeis and held that the defendant's conviction was valid. The dissenting opinion was written by Justice Holmes and held that the conviction was invalid. The case was decided on June 18, 1906.

taxed, against her. The only order affecting her is that, unless she or her husband, or both, pay the amount of the decree with solicitors' fees and costs, then the premises shall be sold to satisfy the decree.

The same point is also made that was decided in the case of Arenson v. Haldane, 105 Ill. App. 589, that there was error in computing the interest. Here, as there, the decree computed interest to its date at the contract rate of seven per cent and it was contended that the statutory rate of five per cent should have been charged on the totals in the master's report. Citing Parker v. International Bank, 80 Ill. 96-101, the court held that the holder of a note was entitled to interest at the contract rate to the date of the decree. (See also Gillett v. Chicago Title & Trust Co., 230 Ill. 373.) In the opinion of the Arenson case the court distinguished it from the Patterson case, 89 Ill. App. 406, in that in the latter the decree was inconsistent with the formal confirmation of the master's report. The decree before us did not confirm the first report though based in part upon it. It specifically found the several amounts due on the principal and coupon notes with interest at the contract rate and the aggregate amount due. We think the computation of interest is regular and proper and not in conflict with Sec. 3, Chap. 74 of the Revised Statutes relating to interest.

Whatever view we might entertain of appellant's other points, as the authorities leave some plausibility for their contention on the subject of interest, we would not feel justified in treating the case as one where additional damages^{should} be assessed on the theory that the appeal was prosecuted solely for purposes of delay.

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...or both, pay the amount of the
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...the same point is also made that was decided in
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...of the Nevada Statutes relating to interest.
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...the case as we have additional
...on the theory that the appeal was
...for purposes of delay.

63 - 24357

PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

vs.

JOHN DOE alias Thomas
Ferrell,
Plaintiff in Error.

213 I.A. 688

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted upon an information for assault and battery on a trial had before the court without a jury.

While the court's orders postponing the case for "trial" after a finding of guilty are somewhat inconsistent ^{as} yet defendant appeared and recognized jurisdiction both of his person and the cause on each occasion we are not prepared to hold that the court lost jurisdiction because the case was postponed two or three times for a few days before entry of judgment on the court's finding.

But the judgment must be reversed for the reason that the defendant was not given a fair trial. He was employed at the LaSalle Hotel of Chicago to show its guests to taxis in front of it. The complaining witness was a driver of a taxi. The assault grew out of an altercation between them. Defendant called as a witness to the assault a guest of the hotel, an apparently respectable young man residing in Iowa and attending college at Cornell University. In the course of his direct examination he stated that the complaining witness was circling his taxi in front of the hotel without taking

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passengers, whereupon the court interrupted the examination and the following colloquy ensued:

"THE COURT: Q Is it not a fact that somebody called him every time he circled around?

A No sir, absolutely not.

THE COURT: I don't believe you.

THE WITNESS: Judge, I am on my honor here. I can prove that I am a man of honor.

THE COURT: I would not believe you under oath now.

THE WITNESS: What is the use of having testimony here then?

THE COURT: Go ^{on} home then.

THE WITNESS: I never was in such a court in my life.

THE COURT: Get out of the room quick. If you don't like the way things are run here, get out of the room. Where's the bailiff?"

Whereupon the witness left the court room as directed by the court.

Defendant's counsel excepted to the court's action and the witness left the court room without further examination. Defendant repeatedly asked leave of the court to recall the witness, complaining of the court's unfairness and stating material matters the witness would testify to. But the court refused to hear him.

The record calls for observations we regret having to make. It is hardly to be wondered at that this non-resident witness should exclaim after such a colloquy 'that he never was in such a court in his life.' Few records disclose a greater disregard of judicial proprieties and of fundamental principles in court procedure. There is no semblance of a fair trial when in the midst of a witness' testimony the judge in effect characterizes him as a perjurer and autocratically drives him from the witness stand before he has finished his testimony. And the record does not

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furnish the slightest excuse for such a proceeding. The fact to which the witness testified had not been denied and was not in itself improbable, and he had not been impeached.

But other remarks of the judge indicated that his opinion of the witness' veracity rested upon a previous experience of his own in front of the hotel, and before fixing the fine he said he was "going to continue the case until January and see how much fighting there is going to be."

It would seem unnecessary in the present stage of the development of judicial procedure to state that a judge before whom a case is brought for trial without a jury cannot decide the issues on his private experiences and personal observations but must do so on evidence produced at the trial, and should defer passing on its sufficiency and the credibility of the witnesses, until the testimony is all in.

Such unfairness and departure from regular procedure as this record discloses compel us to reverse the judgment and remand the cause for a fair trial.

REVERSED AND REMANDED.

[illegible]

266 - 24193

NINETTE MITCHELLTREE,
Appellee.

vs.

WILLIAM F. NETTING and ANNA J.
KAMLER, copartners, trading as
NETTING, KAMLER & CO.,
Appellants.

2131.A. 688

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellants, defendants below, were sued by plaintiff for money had and received by them as agents of the plaintiff from the sale of a lease of a certain store. The case was tried by the court. The finding was for plaintiff and judgment entered thereon.

The facts as they appear from the pleadings and evidence are that one Frank Cuneo was the owner of a building at 1008 Wilson avenue in the city of Chicago, in which was located the store in question. He leased this store to Gibsons Picture & Gift Shop, a corporation. The lease was dated October 1, 1916, and by its terms would expire April 30, 1918. Appellants as agents for appellee negotiated and obtained an assignment of this lease, the consideration for the same being furnished by appellee and one Ambrose J. Krier. The assignment was executed in blank and together with the lease was delivered to appellants July 21, 1917. By the terms of the assignment Gibsons Picture & Gift Shop retained the right of possession until July 31, 1917.

On July 21st following, appellants in behalf of appellee entered into negotiations with Spaulding Waist Shops, a corporation, for the resale of this lease to it. The Waist Shops

demanding as a condition to their purchase of it that the lease should be extended for a further period. Appellants, through an employee named Crons, secured the verbal promise of the owner to extend the lease as requested and informed appellee thereof. The transaction was consummated July 25th. The name of the Waist Shops was written into the blank assignment of the lease and the instrument delivered to it and it paid appellants therefor the sum of \$1800.00. As a part of the transaction appellants also delivered to the Waist Shops an agreement in writing by which they promised to obtain from Cuneo a lease of the store from August 1, 1917, to April 30, 1920, at a rental of \$150.00 per month, and further covenanted that the possession of the premises should be delivered to the Spaulding Waist Shops on August 1, 1917. They did not secure this lease and they apparently could not deliver the possession of the premises to the Spaulding Waist Shops on August 1, 1917, as agreed. The Waist Shops thereupon sued appellants in the Circuit court of Cook County for a return of the \$1800.00 paid, which its declaration alleged had been fraudulently obtained.

Appellants offered in evidence a letter from their attorney and proved it was received by the plaintiff October 13th, 1917. In it the plaintiff was notified of the suit in the Circuit court, and it stated:

"Inasmuch as Netling, Kahler & Co. were acting as your agents in this transaction, I am writing you to inform you that the \$1800.00 which the Spaulding Waist Shops, Inc., paid to Netling, Kahler & Co., will be paid to you if you agree to hold Netling, Kahler & Co. harmless on account of the litigation which we have been compelled to defend in your behalf, in order to protect your interest in the \$1800.00."

Appellants also offered to show with respect to the Circuit court suit that a verdict had been rendered against them therein for the sum of \$1833.75, and they moved the court for a continuance of the cause until the suit in the Circuit court should

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...in the ...
...of the store ...
...at a rental of \$150.00 per month, and
...that the possession of the premises should be
...on August 1, 1937. They
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...and proved it was received by the plaintiff ...
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...in order to protect your interest in the ...
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...for the sum of \$150.75, and ...
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be finally disposed of. The evidence offered was excluded and the motion for a continuance was denied. Evidence tending to show that plaintiff did not have the rights of title and possession agreed to be transferred to the Waist Shops was also excluded.

Appellee urges, and this seems to have been the theory of the trial court, that the writing whereby it was agreed that the lease should be extended and possession delivered was executed by the appellants in their own names and without authority from her; that it was outside the scope of their authority as agents, and that she, therefore, is not bound thereby. It is true it is not made to appear that she had knowledge of or authorized the execution and delivery of the specific writing. However, she knew the promises contained in it were being demanded by the prospective purchaser and that appellants as her agents were endeavoring to satisfy the purchaser with respect to them. She had knowledge of the written contract prior to bringing this action for the proceeds of the sale, and while prosecuting the suit the written contract was necessarily brought to her attention and all the facts in connection with the execution and delivery of it. We understand the law to be that a principal who with full knowledge of the facts that his agent has made an unauthorized contract in his behalf, brings an action against the agent for the recovery of the money received by the agent through such contract thereby affirms and ratifies the contract and waives his right to maintain an action to avoid it on the ground of lack of authority or fraud. It is, of course, only elementary to say that if the contract is ratified it cannot be ratified in part. The principal may not receive the benefits of the contract without also assuming its burdens. When the facts are made known to him he is put to his election and is bound thereby. Murray v. Hann, 2 Exchequer Reports 537; Bailey v. Partridge, 134 Ill. 188; Frank v. Jenkins Bros. & Chipman, 22 Ohio State 597; Delaware.

[illegible]

Lackawanna & Western Ry. v. Thayer, 41 Ill. App. 192; Arzuaga et al. v. Gonzalez et al., 239 Fed. 60. It follows that the trial court proceeded on an erroneous theory and that the evidence which was offered tending to show that the Spaulding Waist Shops was prosecuting its suit for fraud against appellants and had obtained a verdict against them therein, was improperly excluded.

Plaintiff sued for money had and received. This is an equitable action and governed by equitable principles. Highway Commissioners v. Bloomington, 253 Ill. 164; Law v. Warlaub, 104 Ill. App. 263. If she failed to defend the suit brought against appellants in the Circuit court and refused to indemnify them in case the money was turned over to her, it would be highly inequitable to permit her to recover. Peyser v. Wilcox, 64 Howard Practice, N. Y. 525. In an action of this kind the defendants may show any fact that entitles them to retain the money sued for on either legal or equitable grounds. Murray v. Mann, *supra*; Wait's Actions and Defenses, 1878, p. 511; Belden v. Perkins, 78 Ill. 453.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

272 - 24199

LETTIE PARKER,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

2131A: 888

Appeal from

Superior Court,

Cook County.

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$2000 in favor of the plaintiff in an action on the case for personal injuries. The cause was submitted to a jury.

The original declaration in each of its counts averred "that prior to the commencement of this suit as required by statute she caused to be served on the city of Chicago, its city clerk and city attorney, a certain notice giving the name and residence of the person injured, the date and the hour of the accident, the location where said accident occurred and the name and address of the attending physician, a copy of which ^{is} said notice/ attached to this declaration and marked Exhibit 'A' and made a part of this count, the same as if herein specially pleaded and to which reference may be had."

To the declaration the defendant, city of Chicago, filed a plea of general issue, but after the jury was impaneled, the defendant by leave of court and over the objection of the plaintiff was allowed to withdraw its plea and file a demurrer to the declaration. This demurrer was sustained. The plaintiff filed an amended declaration in which it set up in haec verba a sufficient notice which it alleged had been duly served upon the city. To this defendant interposed a plea of the statute of limitations. The plaintiff demurred

and the demurrer was sustained by the court. The alleged error of the court in this regard is the principal matter urged here.

The rule to be applied is clearly laid down in Walters v. City of Ottawa, 240 Ill. 259. It was there stated as follows: "If the original declaration states a cause of action, however defectively, provided it is sufficient to sustain a judgment, an amendment is permissible amplifying the statement of the same cause of action, and will relate back to the filing of the original declaration so as not to be subject to the intermediate running of the statute of limitations." It is true as appellant points out that the exhibit attached to the plaintiff's declaration forms no part of it, and that the attempt to make it a part of the common law declaration by reference was wholly ineffectual for that purpose. Jones v. City of Chicago, 167 Ill. App. 175; Harlow v. Rowell, 15 Ill. 57.

We think, however, that excluding the attached exhibit, the declaration was sufficient to sustain a judgment. (Sargent Co. v. Baublis, 215 Ill. 428) and, therefore, the court did not err in sustaining a demurrer to the plea of the statute of limitations.

Appellant also complains that the court erred in admitting in evidence two photographs of the place of the alleged injury. When these photographs were offered in evidence by plaintiff the defendant objected, but afterwards used the photographs as its own in the trial and by so doing, we think waived any objection to their admissibility.

It is also urged that the damages awarded are excessive. We do not think so.

Appellant also complains because the court refused its request to give to the jury the following instruction:

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education, and the need for employment. The process of urbanization has led to the growth of large cities and the decline of small towns. This has had a number of effects on the United States, including the concentration of population in a few areas, the loss of rural life, and the development of a new urban culture.

[illegible]

...the destination was not known to anyone in the group. ...the destination was not known to anyone in the group. ...the destination was not known to anyone in the group.

Appellant also complains that the court erred in admitting in evidence two photographs of the place of the alleged injury. When those photographs were offered in evidence by Plaintiff the defendant objected, but afterwards admitted the photographs as far as in the trial was so being.

It is also urged that the Government is not to be held responsible for the actions of the individual officers and men of the Army. It is also urged that the Government is not to be held responsible for the actions of the individual officers and men of the Army.

"The jury are instructed that the defendant, City of Chicago, is not an insurer against accidents upon its sidewalks, nor is it liable for every defect therein, though it might cause the injury sued for. And if you find from the evidence that the sidewalk at the place of the alleged injury was in a reasonably safe condition for travel in the ordinary modes, then you will find the defendant, City of Chicago, not guilty."

The proper elements of the instruction were contained in others given. It was somewhat misleading. We think the court did not err in refusing to give it.

The judgment of the trial court will be affirmed.

AFFIRMED.

10-10-44

profits of industries were concentrated in a few hands.

...and the ...

Committee of Fifty Seven

238 - 24215

WILLIAM DOMSKI, Appellee,

vs.

BORGEN'S DAILY COMPANY,
a corporation, Appellant.

213 I.A. 689

Appeal from

Circuit Court,

Cook County.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered upon the verdict of a jury in an action on the case for personal injuries.

The plaintiff in his declaration alleged that on September 12, 1916, while walking in a westerly direction in the city of Chicago at the intersection of Carpenter and Erie streets, he was run into and injured by a milk truck driven by the servant of the defendant, appellant. He also alleged negligence and mismanagement of the truck, failure to warn plaintiff of its approach, failure to keep control of it, failure to keep a proper look out, violation of a city ordinance and excessive speed contrary to the statute.

The principal contention of appellant is that the verdict is manifestly against the weight of the evidence and that plaintiff was guilty of contributory negligence. Appellee argues that as the bill of exceptions does not show a motion at the close of all the evidence to direct a verdict, and further as no motion for a new trial or ruling thereon is preserved in the bill of exceptions, the court cannot consider the weight of the evidence. Such was undoubtedly the law as indicated by the cases cited. Streater Independent Telephone

EXHIBIT A. 600

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Co. v. Continental Telephone Construction Co., 217 Ill. 577; The St. Louis & O'Fallon Ry. Co. v. The Union Trust & Savings Bank, 209 Ill. 457; The Oil Belt Ry. Co. v. Lewis, 259 Ill. 108; Pate v. Blair Big-Muddy Coal Company, 252 Ill. 198. And such is the law now unless it has been changed by the amendment of 1911 to section 81 of the Practice Act, Hurd's Revised Statutes, Chap. 110, page 2246. We do not find it necessary to decide that question.

The injuries for which plaintiff sued were sustained by him on the morning of September 12, 1916, Erie street is a public highway extending east and west, Carpenter street is a public highway extending north and south. The plaintiff at the time of the trial was about 46 years of age and is by trade a carpenter. On the morning in question he went to work about 8 o'clock and worked until 10 when his material was exhausted. He then went home and changed his clothes and started out to take measurements on another job some ten blocks away. On his way he stopped at a saloon which was situated at the northeast corner of the intersection of the two streets above named. He bought a glass of beer and drank a part of it. He had previously on that morning taken a drink of brandy. He left the saloon from the front door and as he says looked north and south to see if the way was clear before proceeding across the street. He then proceeded in a westerly direction and when a few feet from the west curb line of Carpenter street was struck by the truck driven by the servants of defendants. The truck weighed 6900 pounds and was at the time carrying a load of nearly four tons. After striking plaintiff it continued north and came to a stop near the west curb of Carpenter street about 40 feet away.

The evidence also tends to show that the driver was late and in a hurry and that as he came from the east on Erie

late and in a hurry and that as he came from the east on this

road the witness also tends to show that the driver was

near the west end of Carpenter street about 40 feet away.

After striking plaintiff it continued north and came to a stop

boards and was at the time carrying a load of nearly four tons.

driven by the occupants of defendant's. The truck weighed 60

went and line of Carpenter street was struck by the truck

plunged in a westerly direction and when a few feet from the

the way was clear before reaching across the street. He then

the first door and as he says looked north and south to see if

that vehicle failed a drink of whisky. He left the vehicle from

a glass of beer and drank a part of it. He had previously on

at the intersection of the two streets above named. He passed

attracted to a person which was standing at the sidewalk corner

the first time and stopped his vehicle and started out in this

a vehicle and wanted until he when his material was exhausted.

direction. On the morning in question he went to work about

time of the trial was about 40 years of age and is by trade a

vehicle which extends north and south. The plaintiff at the

vehicle which extends east and west, Carpenter street is a

by him on the morning of September 12, 1914. It seemed to a

the injuries for which plaintiff was were sustained

plaintiff.

1914, 1915, 1916. He at that time it necessary to testify that

vehicle of the vehicle was, Ward's vehicle, Chicago.

plaintiff was at the time of the accident, 1914, 1915, 1916, and was in the law

1914, 1915, 1916; The City Hall, Chicago, 1914, 1915, 1916; Ward v.

1914, 1915, 1916; The City Hall, Chicago, 1914, 1915, 1916; The

street he turned north to the right on Carpenter street, but failed to keep inside the center of the street as required by the city ordinance. The evidence offered by plaintiff further tended to show that as the truck turned it struck the plaintiff in the back knocking him down, rendering his unconscious and running over and mangling his left hand. This version of the accident is testified to by plaintiff, by Hebert Motzney who kept the saloon, and by Frank Benianek who was at the time working in a large factory on the southeast corner of Erie and Carpenter streets. This last named witness testified he saw the accident through a window from the second floor of the building in which he worked. The testimony of these witnesses, as well as that of a fellow laborer who worked with plaintiff on the morning of the accident, is to the effect that the plaintiff at the time in question was in a sober condition and not under the influence of liquor.

On the other hand the driver of the truck and his helper testify that they first saw plaintiff about 125 feet east of Carpenter street on Erie street; that there was not much traffic in the street that day; that plaintiff was on the right side of Erie street walking west and passing in the direction the truck was going; that when they first saw him he was about opposite the truck; that he seemed as though he was drunk and they paid no more attention to him; that he staggered on the street not walking straight and looking down at the sidewalk; that they went on right past him; that the horn was sounded six or seven times; that they commenced to sound the horn about twenty-five feet from Carpenter street; that the driver did not see plaintiff as he made the turn there; that the plaintiff grabbed the right front fender, about the center of the fender towards the high part, just above the wheel; that the

... he turned north on the right on Carpenter street, but failed to keep inside the center of the street as required by the city ordinance. The evidence offered by plaintiff further shows that on the truck turned it struck the plaintiff on the side knocking him down, rendering him unconscious and leaving over and mangled his left hand. This version of the accident is testified to by plaintiff, by Robert Johnson who was the driver, and by Frank Bonham who was at the time working in a large factory on the southeast corner of Main and Carpenter streets. This fact named witness testified to saw the accident through a window from the second floor of the building in which he worked. The testimony of these witnesses is well at odds of a Police Inspector who worked with plaintiff on the morning of the accident, as to the effect that the plaintiff at the time in question was in a sober condition and not under the influence of liquor.

On the other hand the driver of the truck and his fellow testify that they first saw plaintiff about 12:30 p.m. at Carpenter street on that day; that there was not much traffic in the street that day; that plaintiff was on the right side of the street walking north and passing in the direction the truck was going; that when they first saw him he was about opposite the truck; that he seemed as though he was drunk and they paid no more attention to him than they do strangers on the street not walking straight and looking down at the sidewalk; that they went on right past him; that the horse was rounded up at once; that they continued to round the horse about twenty-five feet from Carpenter street; that the driver did not see plaintiff as he made the turn there; that the plaintiff first grabbed the right front fender, about the center of the fender towards the high part, just above the wheel; that the

truck was being driven then about four or five miles an hour; that when the driver saw him grab the fender he put on his brakes to stop the truck and that he stopped it in about seven or eight feet; that the plaintiff fell over backwards; that the driver then got off the car and went around behind it and the plaintiff's body as it laid in the street was about six or seven feet from the rear of the truck.

We think the jury was justified in finding the driver negligent. Whether the plaintiff proved he was at and just prior to the accident in the exercise of due care and caution for his own safety, is a closer question on the facts. The larger number of witnesses were of the opinion that plaintiff was in an intoxicated condition just after the accident. This tended to support the testimony of defense as to plaintiff's want of care. "The rule is that voluntary intoxication will not excuse a person from such care as may reasonably be expected from one who is sober." South Chicago City Ry. Co. v. Dufresne, 200 Ill. 464. Plaintiff admitted drinking a glass of beer just prior to the accident and shortly before that, one of brandy. In his unconscious condition after the accident with the odor of liquor on his breath, these witnesses might easily have been mistaken in their opinions that he was in fact drunk. The issue of fact was for the jury and we cannot say its verdict was manifestly against the weight of the evidence.

Appellant also complains that the court erred in permitting certain questions to be put to a witness of defendant on cross examination and that counsel for the plaintiff in the trial of the case made improper statements in his argument to the jury. We have examined these alleged errors and do not think that either of them can be sustained.

... being driven then about four or five miles an hour;
that when the driver saw him grab the trigger he put on his brakes
to stop the truck and that he stopped it in about seven or eight
feet; that the plaintiff fell over backward; that the driver
then got off the car and went around behind it and the plain-
tiff's body as it laid in the street was about six or seven feet
from the rear of the truck.
Now what the jury was justified in finding the driver
negligent. Whether the plaintiff proved he was or not that
is for the jury to decide. It is the province of the jury to decide
whether the plaintiff is a person who is a person on the facts. The
lawyer's duty of witness was of the opinion that plaintiff
was in an industrial condition just after the accident. This
tended to support the testimony of defense as to plaintiff's
condition at the time. "That was in fact voluntarily intoxicated with
alcohol and a person from such cause as may reasonably be expected
from one who is sober." *People v. ...*
The plaintiff admitted during a cross-examination
that at the accident and shortly before that was in a drunken
condition. The plaintiff also stated the accident with the other
of intent on his part, these witnesses might easily have been
shown in their testimony that he was in fact drunk. The
fact of that was for the jury and we cannot say the verdict
was manifestly against the weight of the evidence.
The plaintiff also complains that the court erred in
presenting certain questions to be put to a witness or defendant
on cross-examination and that counsel for the plaintiff in the
trial of the case made improper statements in an argument
to the jury. We have examined these alleged errors and do not
think that either of them can be sustained.

For the reasons indicated the judgment will be affirmed.

AFFIRMED.

100

318 - 24245

FRANCIS M. ENRIGHT and JAMES P.
PRENDERGAST, doing business as
ENRIGHT & PRENDERGAST,
Appellees,

vs.

DAVID C. COCK,

Appellant.

2131.A. 689

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellees Enright and Prendergast sued appellant, David C. Cock, with Benjamin A. Fessenden and J. C. Abbott, for the price of certain plans for an improvement on premises owned by appellant, Cock, at 72-82 East South Water street, Chicago. The plans were made by H. J. McFullen, an architect, at the request of the plaintiffs, and the circumstances under which they were made were as follows:

Appellant was the owner of premises in Chicago on which was a building that had been partly destroyed by fire. He lived in Elgin, Illinois. B. A. Fessenden, now dead, was engaged in the real estate business in Chicago and was his agent. B. A. Fessenden placed a sign upon the premises which read: "For lease to acceptable tenants or your own broker." Mr. A. C. Fessenden was a son of B. A. Fessenden and assisted his father in his business. J. C. Abbott was in the garage business and A. C. Fessenden opened negotiations with him for the demise of these premises to be used for that purpose, and it was suggested that certain improvements might be made thereon as required by Abbott.

The plaintiffs, Enright and Prendergast, were general building contractors. At the request of A. C. Fessenden they agreed to make a general examination of the building without charge. This was in the nature of a preliminary report. Mr. Enright ex-

2131.A.639

CHICAGO, ILL.

THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA
DOES hereby certify that the following is a true and correct copy of the
original of the same as the same is on file in the office of the
Clerk of the said Court.
GIVEN UNDER MY HAND AND SEAL OF OFFICE this 1st day of January, 1900.
J. C. ABRAHAM, Clerk of the Court.

plans that he took "a gambling chance", hoping to get the work. It was estimated that the proposed improvements would cost about \$16,500. The lease to Abbott was drawn for a term from September 1, 1915, to April 30, 1920, and it provided that the lessee should deposit with the lesser as security for ^{the} performance of its covenants the sum of \$10,000. This deposit was never made, and the deal fell through apparently for that reason. There was no evidence that Cook had knowledge of or ordered the plans.

The court found for plaintiff and entered judgment. It is apparent from the rulings of the court upon the propositions of law and fact submitted that the theory of the court was that E. A. Fessenden was the agent of the defendant, Cook, and that he had ordered these plans in Cook's behalf, and had authority to do so.

Plaintiffs' evidence was admitted upon the promise of plaintiffs that they would connect it up and show the authority of Fessenden to order the plans in Cook's behalf. When the plaintiffs called the architect as a witness the court suggested, "I think that before you proceed with the other work you ought to connect up with the defendant." At this suggestion plaintiffs then called as a witness the defendant J. C. Abbott, who was later dismissed by them out of the case and who testified that he knew David C. Cook; that he met him in connection with the building on South Water street in Elgin in July, 1915, and talked with him in regard to it; that he asked him if they should close the deal that they had up, whether he could get an entrance to the building on the Michigan avenue side; that David C. Cook said to him that he was surprised Mr. Fessenden did not have the lease signed and that he would be glad to go over it; that the witness then said to him that he would like to talk with him about it and that he, Cook, then said that he would take it up with his agent by long

distance telephone and would then advise the witness as to the arrangement that he wanted to make; that his agent was Mr. Fessenden, Sr.; that he told him he would hear from the young man, Fessenden; that thereupon the witness continued the negotiations in regard to the property with the two Fessendens.

It is undisputed that the plans in question were never delivered either to Cook or to the Fessendens, nor does it appear that anyone at any time had any conversation with Cook about these plans. It was the intention that they should be attached to the lease in case it was executed. The proposed lease was sent to appellant and he signed it, but the lessee was unable to make the required deposit, so it was not delivered and the whole scheme fell through. Appellant cannot be held liable unless he authorized Fessenden as his agent to order the plans or ratified the order after it was made. He cannot, we think, be held to have ratified it for the reason that the evidence fails to disclose that knowledge of the facts of such a contract, assuming it was in fact made in his behalf, was ever brought home to him. A principal cannot be held to have ratified an unauthorized act of an agent unless he is first fully and clearly informed of the material facts and circumstances of the matter which he is deemed to have ratified. Matthews v. Hamilton, 23 Ill. 416; Bill v. Ite, 230 Ill. 39-40.

Appellee invokes the rule that a person dealing with an agent in good faith on the faith of his apparent powers and without notice of facts showing that the act was unauthorized, may hold the principal liable whether the act was authorized or not. McDonald v. Chisholm, 131 Ill. 273; St. L. & S. Ry. Co. v. Elgin Condensed Milk Co., 74th Ill. App. 624. We do not question that rule, but it is not made to appear by the evidence that either of the Fessendens had such apparent power. The evidence indicates

... testimony and would then return the witness as in the
... that he wanted to make; that his agent was ...
... that he would hear from the ...
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... of the property with the ...

It is undisputed that the ... in question was
... either to look at the ... or that it
... at any time had any conversation with ...
... it was the intention that they should be ...
... in case it was executed. The ...
... and he ... and the ...
... as it was not ...
... Agent ... he held ...
... as the agent to order the ...
... the order after it was made. He cannot, ...

It is ... for the reason that the witness
... of the facts of such a ...
... in his ... and was brought ...
... to have testified as ...
... of ... and clearly ...
... of the ... which he is
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... that a ... with
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... 220 ... 20-20. He does not ...
... by the evidence ...
... The ...

the authority of a real estate broker whose business for his principal was to find tenants for his property. As such agent he undoubtedly had the authority to negotiate a lease and implied authority to do whatever was proper, usual and reasonable to that end. That the Bessemonds did not have authority to execute the lease is apparent from the fact that it was sent to Cook for that purpose. Whatever the limits of their apparent authority may have been, it seems clear that it did not include the power to bind the principal for the expense of plans to make an improvement costing \$16,500. Durkes v. Carr, 63 Pac. Reporter, 117.

As the record is wholly barren of evidence tending to show that the agent of appellant had authority or apparent authority to contract for the plans in behalf of appellant and likewise fails to disclose any evidence tending to show a ratification by him of such a contract even if it be conceded it was made, the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Page 10 of 10

The authority of a real estate broker whose business for him

is to find tenants for his property, as such agent as

negotiates the lease is not a landlord and is not

liable to a landlord for the same, unless and otherwise as

may be. That the respondent did not have authority to execute

the lease is apparent from the fact that it was not to be

made. Moreover, the limits of their agency authority

are not clear. It seems clear that it did not include the power to

make a contract for the execution of plans to make an improvement

on the property. Smith v. Smith, 117, 118, 119.

As the record is clearly before of evidence showing

that the respondent had authority to execute

the lease, the respondent is liable to the plaintiff and

the plaintiff is entitled to recover damages for the same.

It is not to be denied that it is conceded that

the respondent will be required to pay a fine of \$100.

THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

1908, 1909, 1910

1911, 1912, 1913

1914, 1915, 1916

318 - 24245

FINDING OF FACT.

We find as fact that appellant, David C. Cook, did not by his agent or otherwise order or contract for the plans for the cost of which appellees sue, and that he did not ratify any contract for said plans.

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324 - 24251

CHARLES F. FORSTER,
Appellant.

vs.

FRANKLIN PARK FOUNDRY COMPANY,
a corporation, JAMES P. WALSH
and J. TRING BROOKS,
Appellees.

213 I.A. 689

Appeal from

Superior Court

of Cook County.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant below from a decree which dismissed his bill for want of equity. He sued as the equitable one-half owner of any money which might be recovered in a suit brought by Forster-Waterbury & Company, a corporation, now the Franklin Park Foundry Company, appellee, against the Webster Manufacturing Company. The bill of complaint charges that recovery against the Webster Company was made impossible by reason of a conspiracy between the defendants and its agents, whereby material evidence was "removed or wantonly destroyed" with full knowledge of their value and importance in said Webster suit." The cause was referred to a master. The court overruled exceptions to his report and dismissed the bill as recommended by him. The overruling of these exceptions and the entering of the decree are the errors alleged.

The material facts are that on January 14, 1911, the complainant Charles F. Forster and one Ray Walker, Jr., were the joint owners of all the stock of Forster-Waterbury & Company, which was an Illinois corporation. Forster was president, treasurer and a director of the corporation. Walker, Jr., was also a director.

On January 14, 1911, Forster sold all his stock in the corporation to Walker. The transaction was evidenced

by a written contract between them. A suit by the corporation against the Webster Manufacturing Company was then pending. The contract between Hay Walker and Forster provided that Forster should take personal charge of this suit and any sum recovered, less fees and expenses, should be divided equally between them.

The suit arose out of a contract between the Webster and the Forster-Waterbury Companies made July 17, 1899, wherein the Forster-Waterbury Company agreed to manufacture 1000 tons of chain per year, or so much thereof as the Webster Company should order, and the Webster Company agreed to pay, therefore, a price to be fixed by adding to the actual cost of manufacture the sum of \$20.00 per ton, the items of cost to be submitted to the Webster Company, and any dispute or difference arising between the parties to be arbitrated.

The suit at law for damages for alleged breach of this contract was begun October 29, 1901. On June 24th thereafter the Webster Company filed a bill in the Circuit Court to restrain the prosecution of it and prayed that an account be taken. A demurrer to the bill was sustained, but on appeal the order was reversed and the cause remanded. Thereupon the Forster Company filed its answer to the bill and the cause was referred to a master in chancery to ^{take} the account.

In this litigation the Forster Company was represented by the law firm of DeFrees, Brace & Ritter. On January 27, 1911, pursuant to the contract between complainant and Hay Walker, Jr., John A. Massen was substituted. After ineffectual efforts to get a settlement, he caused the case to be set for hearing and began the introduction of evidence. As the trial progressed he came to the conclusion that it would be impossible to recover unless he could have what was known as the "Foundry Cost Cards." These were the only records showing the actual cost of the chain

(1777)

by a written contract between them. A suit by the corporation against the Webster Manufacturing Company was then pending. The contract between Ray Walker and Webster provided that Webster should take personal charge of this suit and any sum recovered, less law and expenses, should be divided equally between them. The suit arose out of a contract between the Webster and the Webster-Manchester Companies made July 17, 1899, wherein the Webster-Manchester Company agreed to manufacture 1000 tons of chain per year, or so much thereof as the Webster Company should order, and the Webster Company agreed to pay, therefore, a price to be fixed by adding to the actual cost of manufacture the sum of 10.00 per ton, the item of cost to be submitted to the Webster Company, and any dispute or difference arising between the parties to be arbitrated.

The suit at law for damages for alleged breach of this contract was begun October 20, 1901. On June 24th there-
after the Webster Company filed a bill in the Circuit Court to
control the prosecution of it and prayed that an account be
taken. A demurrer to the bill was sustained, but on appeal the
court was reversed and the cause remanded. Thereupon the Webster
Company filed its answer to the bill and the cause was retried
in a master in equity to ^{take} the account.

In this litigation the Webster Company was represented
by the law firm of Coffey, Brown & Hittler. On January 27, 1911,
pursuant to the contract between complainant and Ray Walker, Jr.
John A. Hannon was substituted. After ineffectual efforts to
get a settlement, he caused the case to be set for hearing and
began the introduction of evidence. As the trial progressed he
came to the conclusion that it would be impossible to recover
unless he could have what was known as the "Tombey Cost Bonds".
There were the only records showing the actual cost of the chain

manufactured and delivered. He requested the company to get these cost cards. Search was made for them, but they could not be found and as a result the litigation was abandoned and the suit in which more than \$100,000 was claimed, dismissed.

We agree with attorneys for appellant that aside from the necessity of resorting to a court of equity in order to establish the rights of appellant as the equitable assignee of a one-half interest in the Webster litigation, his suit has all the earmarks of an action at law for damages. It is not seriously argued that the evidence proves any conspiracy as alleged. It is, however, urged that complainant may recover on either of two theories, (1) that defendants are guilty of conduct which amounted to a conversion of the Foundry Cost Cards, (2) that they are guilty of negligence whereby they were lost. We do not question under the authorities cited that the defendants might in law be held so liable if the facts warranted. The master, however, found the issues against complainant on the facts. The chancellor approved the findings of the master. We have no right to set these findings aside unless they are clearly and manifestly against the weight of the evidence.

We have carefully examined the evidence pointed out by appellant tending to sustain his theory of the case. His argument is necessarily based upon the theory that at the time he left the factory, January 26, 1911, these Foundry Cost Cards were in the factory vaults. For about eleven years prior thereto he was practically in control and management of the suit and of the evidence in question. Walsh, the new president, was appointed attorney in fact for Hay Walker and elected president of the corporation January 23, 1911. Apparently a day or two thereafter he assumed control. The record does not sustain the contention of appellant that the Foundry Cost Cards were at the office of

[illegible]

the corporation at that time. The only proof tending to show they were is the testimony of complainant. He wrote letters which appear in evidence stating this to be a fact, but when examined on the hearing stated that the cards were in the vaults thirty days prior to the time he left. Even this statement is contradicted by the testimony of Massen who says that when he inquired for the cards complainant told him he had turned everything over to Mr. Brace. Complainant does not deny he so stated.

The complainant says he went to the office of ^{the} company at Franklin Park on January 28th, for the purpose of getting the Webster package of records; that he was ordered out of the office by Walsh and told not to return until sent for. He, however, admits he made no request for the records, papers and documents, and Foundry Cost Cards at that time. He says he went there thinking he had the right to go into the vault and get them if he wanted to, and that the conduct of Walsh prevented him from doing this. He does not say that he then, or before gave Walsh any information about the Foundry Cost Cards or the necessity of preserving them. The evidence is clear defendants did not have this knowledge at that time. When thereafter through Massen, complainant requested the defendant company to search for and find the cards, etc., the defendant company through Walsh wrote, "Mr. Forster can have access to any and all books, papers and data concerning the Webster Manufacturing Company suit at any time and at any convenient place that either he or you may designate." The complainant did not avail himself of this offer. Search was made by defendants and other employees of the corporation without success.

The records of the corporation were moved to Pittsburg sometime in the month of March following, and appellant

the corporation at that time. The only person falling in line
with the testimony of complainant. He wrote letters
which appear in evidence stating this to be a fact, but when
examined on the hearing stated that the cards were in the
hands of John J. Kelly at the time he left. When this
statement is contradicted by the testimony of John J. Kelly who says
that when he inquired for the cards complainant told him he
had turned everything over to Mr. Pross. Complainant does not
deny he is stated.
The complainant says he went to the office of John J. Kelly
at St. Louis in January, 1911, for the purpose of getting
the latest package of records; that he was ordered out of
the office by John J. Kelly and told not to return until told for. He,
however, admits he made no request for the records, papers
and documents, and Johnny does not state at that time. He says he
went home thinking he had the right to go into the vault and
get what he wanted to, and that the contents of John J. Kelly recovered
him from being this. He does not say that he then, or before
gave John J. Kelly any information about the Johnny does not state of the
necessity of preserving them. The evidence is clear defendant
did not have this knowledge at that time. When Johnny
later Johnny, complainant requested the defendant company to
search Johnny find the cards, etc., the defendant company
through John J. Kelly wrote, "Mr. Pross can have access to any and all
books, papers and data concerning the Johnny Johnny Johnny
company only at any time and at any convenient place and at other
in or you may designate." The complainant did not state
himself of this offer. Search was made by defendant and
other employees of the corporation without success.
The records of the corporation were moved to
Hillsburg sometime in the month of March following, and appearing

urges that the evidence was lost at that time through the negligence of the officials of the company in charge. The master finds that the evidence in question was not sent to Pittsburg; that it was lost while in control of appellant. Appellant contends these findings are not sustained by the proof.

We are unable to say that the material findings of the master as approved by the court are clearly and manifestly against the weight of the evidence. On the contrary we think the evidence wholly insufficient to show complainant had any equitable standing.

The decree is right and it will be affirmed.

AFFIRMED.

334 - 24261

AUGUST BLOCK,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
a corporation, et al.,

On Appeal of CHICAGO
RAILWAYS COMPANY,
Appellant.

213 I.A. 689

Appeal from

Circuit Court,
Cook County.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff below recovered judgment on the verdict of a jury against the defendant in an action on the case for personal injuries. The declaration set up alleged negligence of the defendant in the management and control of its cars, and in particular that it failed to stop its cars so as to avoid injury to the plaintiff which under the circumstances it was alleged that it was its duty to do. A count charged that the defendant wantonly caused the injury, but it is not claimed here that appellant is thus liable.

The accident in which appellee was injured happened in the city of Chicago, December 18, 1914, in the morning between ten and eleven o'clock. The plaintiff at the time was employed by the city of Chicago as a street sweeper. He had been so employed for about two years. He was then about seventy years of age. He was working with another employee of the city on Lincoln avenue, a public street which extends in a general northerly and southerly direction. To the north of the place where he worked and about 150 feet away from him was School street, another public street extending east and west. The defendant street car company maintained two parallel

2131A.688

Illinois Court,
Cook County.

IN SENATE
JANUARY 10, 1914
REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE

AN ACT TO AMEND THE ACTS RELATIVE TO THE LANDS OF THE STATE.

The plaintiff herein recovered judgment on the
verdict of a jury against the defendant in an action on the case
for personal injuries. The declaration set up alleged negligence
of the defendant in the management and control of the same, and
in particular that it failed to stop the same so as to avoid
injury to the plaintiff which under the circumstances it was
alleged that it was the duty to do. A count charged that the
defendant wrongfully caused the injury, but it is not claimed
that the injury was caused by the defendant.

The accident in which special was injured happened
in the city of Chicago, November 10, 1914, in the morning
between ten and eleven o'clock. The plaintiff at the time was
employed by the city of Chicago as a street sweeper. He had
been so employed for about two years. He was then about
seventy years of age. He was working when another employee of
the city on Lincoln Avenue, a public street which extends to
the north of
the street where he worked and about 100 feet away from him was
another street, another public street extending east and west.

tracks on Lincoln avenue. On the west tracks the southbound cars of the company were operated, and the northbound cars ran on the east tracks. At the time in question the sweepers were working northward. The plaintiff was working on the southbound track on the west side of the street when one of defendant's cars approached from the south on the east track. About the same time another car approached from the north on the west track. Plaintiff testified, "When I first saw that car it was about ten feet away from me. Before I looked up and saw the car I stepped to the west and seen automobiles and wagons coming, so I had to step back to the east. I mean I stepped to the west after I saw the car. I had a broom and I was sweeping with it." He further testifies that he stepped back to the east when both the cars hit him at the same time.

Appellee argues negligence from this fact as the motorman of the southbound car testifies that he had it in entire control. We think, however, that plaintiff was mistaken when he said that both of the cars hit him. A preponderance of the evidence indicates that the southbound car stopped about three feet away from him and that he was struck by the northwest corner of the vestibule of the northbound car and hurled against the southbound one. There is no claim that either of the cars was operated at an excessive or dangerous rate of speed, nor is other negligence of any kind made to appear unless it may be said as suggested by plaintiff that the motormen upon both the cars were in a position where they must have seen the situation of the plaintiff (which plaintiff could not see) and that his only chance of escape towards the west was cut off by vehicles on the west side of the car tracks. Under these circumstances it is argued it was negligence for the cars to bear down upon him and it was the

...to himself. At the west corner of the neighborhood
...the company were gathered, and the neighborhood was
...at the time in question the company were
...The plaintiff was working on the neighborhood
...of the west side of the street when one of defendant's
...approached from the north on the east track. About the
...approached from the north on the east
...When I first saw that car it was
...Before I looked up and saw the car
...and some automobiles and women coming.
...I was so busy in the case. I mean I stopped on the west
...I had a broom and I was sweeping with it.
...that he stopped back to the east when both
...at the same time.
...negligence from that time on.
...that he had it in
...control. We think, however, that plaintiff was negligent
...A negligence
...that the neighborhood was negligent about
...the north
...and injured
...either of
...at
...of my kind main to report
...by plaintiff that the
...upon both the cars were in a position where they
...the situation of the plaintiff (which plaintiff
...and that his only chance of escape would
...the west side of the street by walking on the west side of the car
...Under these circumstances it is argued that
...for the case he was doing when the car it was the

duty of at least one of the motormen to stop his car in order that the plaintiff might be extricated from the peril of his position. This contention is necessarily based upon the theory that the street to the west side of the southbound track was congested by automobiles and other traffic to such an extent that it was unreasonable to expect the plaintiff to move in that direction to avoid the dangers of his situation.

The plaintiff is the only witness who testifies that the traffic on the west side of the street was in this congested condition. There is considerable force to the contention of appellant that even if his testimony on this point is taken to be true, it indicates a want of due care for his own safety. Plaintiff was facing north while he worked and could easily look out for and see vehicles that might be coming towards him, as well as street cars, but however this may be, we have examined the evidence and are of the opinion that by a clear and overwhelming preponderance of it, the fact is established that this supposed congested condition of the traffic on the west side of the street, did not in fact exist there at the time of the accident.

The witness Auls who was working for the city and moving in the same direction as plaintiff, to whose orders plaintiff was subject at the time in question, and who was called as a witness for the plaintiff testifies that he was about twenty feet away from him at the time and that he did not then see any southbound vehicles on that street. Peterson one of plaintiff's witnesses was in his store immediately west of the place of the accident at the time it occurred and says that from his position he had an unobstructed view of the cars. This is inconsistent with plaintiff's testimony. The motorman

that it is not least one of the purposes to stop him out in order
 that the plaintiff might be satisfied from the point of his
 position. This contention is necessarily based upon the theory
 that the street to the west side of the neighborhood track was
 crowded by automobiles and other traffic to such an extent
 that it was impossible to expect the plaintiff to move in that
 direction to avoid the danger of his situation.

The plaintiff is the only witness who testified that
 the traffic on the west side of the street was in this congested
 condition. There is considerable force to the contention of
 plaintiff that even if his testimony on this point is taken to
 be true, it indicates a want of due care for his own safety.
 Plaintiff was taking notice while he worked and could easily have
 seen for and see vehicles that might be coming towards him, as
 will be stated here, but however this may be, we have examined
 the evidence and are of the opinion that by a direct and over-
 abundant preponderance of it, the fact is established that this
 supposed congested condition of the traffic on the west side of
 the street, did not in fact exist there at the time of the
 accident.

The witness who was working for the city and
 moving in the same direction as plaintiff, is whose sworn
 testimony was sought at the time in question, and who was
 called as a witness for the plaintiff testified that he was
 about twenty feet away from him at the time and that he did
 not then see any neighborhood vehicles on that street. Further
 one of plaintiff's witnesses was in his street immediately west
 on the place of the accident at the time it occurred and says
 that from his position he had an unobstructed view of the cars.
 This is inconsistent with plaintiff's testimony. The witness

on the southbound car testifies, "There was no other traffic such as autos, horses, or wagons or any other kind of vehicles between School street and Melrose on either side of the track at the time this happened." The motorman on the northbound car testifies, "On Lincoln Avenue north of Belmont I had a clear street where this man was working. I put on my power as I always do running between blocks as I crossed Belmont." In fact the plaintiff is not corroborated by a single witness on this point, although several apparently wholly disinterested persons who saw the accident testified.

We think it is the law that the rights of the operators of the cars are superior to those of one upon the streets between intersections as plaintiff was, and it was his duty to yield the right of way. (Pienta v. Chicago City Ry. Co., 284 Ill. 264.) The legal rights and duties of plaintiff were similar to those of any other pedestrian lawfully upon the streets. His apparent situation as to the employment and work was, of course, a fact which the jury might take into consideration.

To hold that the defendant operating its cars was bound to bring them to a full stop under the conditions indicated by this record would lay down a rule which would make it practically impossible for the street car company to perform its public duties. Upon an examination of the evidence we are satisfied that a clear preponderance of it indicates that plaintiff wholly failed to prove that there was any negligence in the management, operation or control of defendant's cars by failing to stop them, or otherwise. (Roberts v. Chicago City Ry. Co., 262 Ill. 228), and that plaintiff has also failed to prove that he was at and just prior to the time he was injured in the exercise of due care for his own safety. Belt Railway Co. v. Skazypczak,

on the premises and facilities. There was no other facility
such as stairs, balconies, or any other kind of facilities
between the two floors and the one on either side of the track
as the case is stated. The restaurant on the northern end
of the premises, the Lincoln Avenue Hotel at Belmont I had a clear
view of the premises and was working. I put on my power as I
always in running between the two floors as I stated Belmont. It
was the plaintiff is not represented by a single witness on
this point, although several apparently wholly disinterested
witnesses saw the accident testified.

We think it is the law that the rights of the
employees of the case are superior to those of one upon the
premises between the two floors as plaintiff was, and it was his
right to have the right of way. (Chicago v. Belmont Hotel Co.
131 Ill. 231, 232.) The legal rights and duties of plaintiff
were similar to those of any other pedestrian lawfully upon the
premises. His apparent situation as to the employment and work
was, at least, a fact which the jury might take into con-
sideration.

To hold that the defendant operating the cars was
bound to make them to a full stop under the conditions mentioned
by the record would lay down a rule which would make it
impossible for the street car company to perform its
duty. Upon an examination of the evidence we are
satisfied that a clear preponderance of it indicates that
the plaintiff failed to prove that there was any negligence in the
operation or control of defendant's cars by failing
to stop them, or otherwise. (Chicago v. Belmont Hotel Co., 131
Ill. 231, 232.) and that plaintiff has also failed to prove that he
was at and just prior to the time he was injured in the accident
at the time for his own safety. (Chicago v. Belmont Hotel Co., 131

225 Ill. 242.

The judgment of the trial court will therefore be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

THE BOARD OF DIRECTORS OF THE COMPANY

RESOLVED THAT THE BOARD OF DIRECTORS OF THE COMPANY

DO HEREBY CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT STATEMENT

OF THE FINANCIAL STATEMENT OF THE COMPANY FOR THE YEAR ENDING

AT THE CLOSE OF BUSINESS ON THE 31ST DAY OF DECEMBER 1911

AND THAT THE SAME HAS BEEN EXAMINED AND FOUND TO BE CORRECT

AND THAT THE BOARD OF DIRECTORS OF THE COMPANY

DO HEREBY CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT STATEMENT

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AT THE CLOSE OF BUSINESS ON THE 31ST DAY OF DECEMBER 1911

334 - 24261

FINDING OF FACTS.

We find as facts that the appellant, Chicago Railways Company, was not guilty of any negligence which proximately contributed to cause the injuries which appellee, August Block, sustained, and for which he sues, and that he was guilty of contributory negligence whereby he sustained the injuries complained of.

1924 - 1925

1924 - 1925
1924 - 1925
1924 - 1925

It is to be noted that the majority of the cases
presented, was not due to any abnormality in the
structure of the organ, but was due to a
displacement of the organ, and that the
condition was not due to any abnormality in the
structure of the organ.

Relg denied
3/26/19

409a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

213 I.A. 690

ERROR TO

~~APPEAL FROM~~

George B. Kaufer et al,

Plaintiff in Error

vs.

City COURT

No. 8

March Term, 1918.

East St. Louis COUNTY

Romie Louis,

Defendant in Error

TRIAL JUDGE

HON. H. L. BROWNING

Term No. 8.

In the Appellate Court

Agenda No. 4

of Illinois, Fourth District.

March Term, A. D. 1918.

George B. Kaufer and
Anton Ruzich,

Plaintiffs in error

vs.

Remie Louis,

Defendant in error

213 I.A. 690

Writ of Error City Court

East St. Louis, Illinois.

Opinion by Boggs, P. J.

This is a writ of error prosecuted by plaintiffs in error to reverse a judgment or decree rendered by the City Court of East St. Louis, on a creditors bill filed by defendant in error to reach certain funds in the Illinois State Bank of that City, deposited to the credit and standing in the name of "George B. Kaufer, Trustee."

At the March 1916 term of said court, defendant in error had recovered a judgment against the plaintiff in error, George B. Kaufer, and Julia B. Kaufer his wife, for \$1003.56 and costs. Execution was issued thereon, served and returned, "No property found". Said judgment remained in full force and effect at the time of the filing of said bill.

Kaufer a real estate agent in East St. Louis was engaged in selling and renting properties, collecting rents, etc., for various parties, among whom was one Schneiderwind. The record discloses that Schneiderwind owned two cottages, located in "Hortense Place" in said city that he valued at \$4,100.00 and upon which he owed \$1500.00. Being desirous of selling or exchanging these properties, he placed them

213 I. A. 300

Writ of Error City Court
East St. Louis, Illinois.

State of Illinois, Plaintiff in Error,
vs.
George B. Hunter, Trustee, Defendant in Error.

This is a writ of error prosecuted by plaintiff in error to reverse a judgment or decree rendered by the City Court of East St. Louis, on a complaint filed by defendant in error to reach certain funds in the Illinois State Bank of that city, deposited to the credit and standing in the name of "George B. Hunter, Trustee."

At the March 1915 term of said court, testimony in error had recovered a judgment against the plaintiff in error, George B. Hunter, and wife D. Hunter his wife, for \$1000.00 and costs. Execution was issued thereon, served and returned, "no property found". Said judgment remained in full and effect at the time of the filing of said bill. Hunter a real estate agent in East St. Louis was engaged in selling and renting properties, collecting rents, etc., for various parties, among whom was one "Hortense Place". The record discloses that defendant owned two cottages located in "Hortense Place" in said city that he valued at \$4,000.00 and upon which he owed \$1000.00. The record shows of selling or exchanging these properties, he placed them

in the hands of Kaufer for that purpose. Kaufer traded said "Mortense Place" properties to plaintiff in error, Anton Ruzich, for 7.22 acres of land known in the records as the "Woodland Hills Sub-division," Ruzich held a contract of purchase for said land which he had received by assignment from one Victor Lukas. Ruzich assigned the Lukas contract to the "Woodland Hills" property to Kaufer as Trustee and in addition paid him \$1630.00. Kaufer executed his receipt as Trustee for the money paid him by Ruzich and on the same date, July 24th, 1916, deposited \$1550.00 of the money in the Illinois State Bank to his credit as Trustee. This is the money which defendant in error is seeking by this proceeding to reach and have applied in payment of his judgment against Kaufer and wife. Ruzich filed an intervening petition claiming said funds and asking that he be decreed to be entitled thereto and that it be paid to him.

Said cause was referred to the Master to take the evidence and report his conclusions of law and fact. Said Master found in substance the facts as above set forth and in addition found that Kaufer was unable to consummate the contract with Ruzich and that there remained on deposit to Kaufer's credit as Trustee, the sum of \$1482.92 which should be returned to Ruzich together with the contract of purchase on the "Woodland Hills" property; that he (Ruzich) was the equitable owner thereof; and that Kaufer has no right, title or interest in or to said money or property and that no part thereof was subject to the debts of Kaufer. The Master further found that defendant in error was not entitled to the relief prayed and recommended that the bill be dismissed for want of equity.

in the hands of Hunter for that purpose. Hunter intended to
 "settle" the "settlement" by depositing in error, under
 order, for 7.32 acres of land known in the records as the
 "Goodland Hill" subdivision. Hunter held a contract of
 purchase for said land which he had received by assignment
 from one Victor Jones. Hunter assigned the same contract
 to the "Woodland Hills" property to Hunter as trustee and
 in addition paid him \$1850.00. Hunter was to receive
 the money paid him by Hunter and on the same
 date, July 28th, 1916, deposited \$1850.00 of the money in
 the Illinois State Bank to his credit as trustee. This is
 the money which Hunter is now claiming as his own.
 Hunter is now claiming that he is entitled to the money
 because Hunter and wife, Hunter filed an intervening peti-
 tion claiming that funds and asking that he be decreed to
 be entitled thereto and that it be paid to him.
 Said case was referred to the court to take the
 evidence and report his conclusions of law and fact. Said
 court found in substance the facts as above set forth and
 in addition found that Hunter was unable to demonstrate the
 interest with Hunter and that there remained on deposit to
 Hunter's credit as trustee, the sum of \$1850.00 which should
 be returned to Hunter together with the contract of purchase
 in the "Woodland Hills" property; that he (Hunter) was the
 equitable owner thereof; and that Hunter has no right, title
 or interest in or to said money or property and that no part
 thereof was subject to the debts of Hunter. The Hunter
 petition found that defendant in error was not entitled to
 the relief prayed and recommended that the bill be dismissed
 for want of equity.

Exceptions filed by defendant in error to the Master's report were sustained in part and the trial court found that the funds on deposit in the Illinois State Bank to the credit of Kaufer as Trustee are, so far as the rights of the defendant in error, is concerned, the individual property of Kaufer and held that the judgment and execution of defendant in error should be satisfied out of said funds; and that the remainder of said funds after payment of costs be paid over to plaintiff in error Ruzich and that Kaufer re-assign and deliver said contract for the 7.22 acres of land to Ruzich.

It is first contended by defendant in error that plaintiff in error, Ruzich is not in a position to question the judgment and the decree of the lower court for the reason that having accepted the re-assignment from Kaufer of the contract on the 7.22 acres he is not now in a position to prosecute the writ and he cites numerous authorities which he insists support his contention. We are of the opinion, however, that his point is not well taken for the reason that the court in decreeing to plaintiff in error, Ruzich, the return of the 7.22 acres of land which he was proposing to exchange and a return to him of the funds remaining in the bank after the satisfaction of the judgment and execution held by defendant in error was in effect holding that Ruzich was entitled to said land and to said funds except as against defendant in error, and that plaintiff in error was not receiving anything under the decree of the court inconsistent with the claims made by him. In other words, plaintiff in error contends that he is entitled not only to the return of the land but to the return of the entire funds while the trial court held he was entitled to the return of the land

and entitled to a return of the funds except enough to satisfy the judgment and execution held by defendant in error. Our holding, therefore, is that plaintiff in error, Muzich, has not released his rights and that he is entitled to prosecute his writ.

On the merits of this case it is not apparent how defendant in error who is not in the position of a bona fide purchaser for value can have any greater rights in the fund in question than Kaufer, the judgment debtor.

The evidence discloses that Kaufer who was engaged in the business of buying and selling property and of collecting rents, etc., carried the funds which he handled belonging to persons for whom he was doing business in a special deposit as Trustee, and that he did not place any of his individual moneys in this deposit or fund. The record also discloses that at the time he deposited the \$1550. from the funds which he received from Muzich there was only about \$6. on deposit to his credit as Trustee in said bank and that no new deposits were made thereafter. So whatever remained on deposit in the bank in the name of Kaufer as Trustee was all made up of the funds received by him from Muzich with the exception of said \$6.00. The record also discloses that of the \$1630. received by Kaufer he deposited the whole of it in the bank to his credit as Trustee with the exception of \$80.00.

The record further discloses that for any trade he made for Schneidervind he was to have 5% of the cash received so that the amount he would be entitled to on this deal had it gone through would have been about \$80.00 the amount he deducted before he made the deposit. The evidence

[illegible]

is further to the effect that at the time this trade was made Schneiderwind, the owner of the two cottages located in "Mortense Place" was out of the city on his wedding trip and that he did not return for some weeks after said trade was made. On his return he refused to consummate the trade, and Kaufer, as trustee, was unable to carry out the contract which he had entered into with Ruzich for the exchange of said properties. Ruzich, therefore, would be entitled to a return of the consideration which he was giving for the Mortense place cottages, namely, the contract for the 7.22 acres of land and the money which he had paid to Kaufer as trustee, provided said funds could be traced and ascertained. Union Nat'l Bank v. Coetz, 138 Ill.135; Wetherell, Assignee, vs. O'Brien 140 Ill.146-151; Estate of Seiter vs. Howe, 182 Ill.355; Bayer vs. American Trust & Savings Bank, 187 Ill. 68-69; Moore vs. Taylor, 251 Ill.473; Woodhouse vs. Crandall, 197 Ill.110.

The record clearly discloses that the \$1482.92 on deposit in the Illinois State Bank to the credit of Kaufer, Trustee, was made up entirely of funds paid over by Ruzich to Kaufer with the possible exception of some \$6.00. The right of Ruzich to this fund is prior and paramount to defendant in error and the fund has been sufficiently identified, the Circuit Court, therefore erred in sustaining the exceptions to the master's report. The decree of the lower court will be reversed and the cause will be remanded with directions to the trial court to enter a decree consistent with the opinion of the court herein.

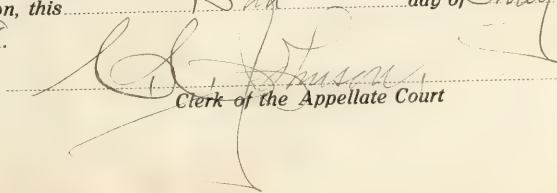
Reversed and remanded.

Not to be reported in full.

... as a result of the effect of the time this trust was made in relation to the owner of the two estates located in "Hortland Place" was out of the city of its wedding trip and that he did not return for some weeks after said trust was made. On his return he refused to consummate the trust, and ... as a result, was unable to carry out the trust.

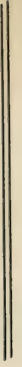
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of May A. D. 1919.


Clerk of the Appellate Court

OPINION

PEE. S



ch'g denied
3/26/19

410a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

213 I.A. 690

~~ERROR TO~~

APPEAL FROM

O. R. Buford et al.,

Appellees

vs.

Circuit COURT

No. 21

March Term, 1918.

Union COUNTY

August F. Bruchhauser et al.,

Appellants

TRIAL JUDGE

HON. WM. N. BUTLER

March Term, A. D. 1918.

G. R. Buford, et al,

Appellees

v.

August F. Bruchhauser, et al,

Appellants

213 I.A. 690

Appeal from Union.

Opinion by Higbee, J.

---000---

Appellants, August F. Bruchhauser, and others by this appeal have brought this case to this court to review the record in a suit wherein appellees G.R. and J.R. Buford recovered a judgment against them for \$1200 for breach of a contract.

Appellees were engaged in the garage business at Anna, Illinois and were occupying a building insufficient for their business and upon which their lease was shortly to expire. One of appellants knowing how appellees were situated, offered to build a garage building for them if they would pay rent at the rate of \$80 per month, would make a lease for five years and furnish adequate security for the payment of the rent as it became due. After some discussion, appellants caused an architect to meet with them and appellees and the plans of a garage were discussed and agreed upon in accordance with a sketch prepared by him. On August 9, 1916 the lease, which is the basis of this suit, was executed by the parties and a short time after that appellees delivered to appellant, a guaranty that the lease would be performed. The building to be constructed by appellant, was

State of Illinois, v. J. A. Butler

2131 A. 200

Appeal from Union

State of Illinois, v. J. A. Butler

State of Illinois, v. J. A. Butler

---000---

Appellants, August W. Bismuth, and others by
 this appeal have brought this case to this court to review
 the record in a suit wherein appellees O.R. and J.A. Butler
 recovered a judgment against them for \$1200 for breach of
 a contract.

Appellees were engaged in the garage business at An-
 na, Illinois and were occupying a building insufficient for
 their business and upon which their lease was shortly to
 expire. One of appellants knowing how appellees were situated,
 offered to build a garage building for them if they would
 pay rent at the rate of \$80 per month, would make a lease
 for five years and furnish adequate security for the payment
 of the rent as it became due. After some discussion, ap-
 pellants caused an architect to meet with them and appellees
 and the plans of a garage were discussed and agreed upon
 in accordance with a sketch prepared by him. In August 1916
 the lease, which is the basis of this suit, was execu-
 ted by the parties and a short time after that appellees
 delivered to appellant, a guaranty that the lease would be
 performed. The building to be constructed by appellant, was

to be completed on or about October 1, 1916 but they failed to erect the same and appellees when the lease on the building occupied by them, expired, rented other premises, which they claim were the only premises suitable for their business they could get which cost them a rental of \$100 a month, and for which they made a lease for the same term of five years as their lease with appellants. Appellees claim that the building they procured was not as suitable and convenient for their business, as the one appellants had agreed to build for them and on June 26, 1917 they brought this suit for damages which they claim to have sustained by reason of the breach of the lease on the part of appellants.

The first count of the declaration, after setting out the lease in full, stated that appellees had always been able and willing to fully keep and perform all of the promises on their part to be kept and performed and to pay rent in accordance with the terms of the lease; that on October 1, 1916, they requested appellants to deliver to them possession of said building and premises but that appellants, contriving to deceive and defraud them, did not at said time or afterwards, deliver to them the possession and occupation of said building and premises. In addition to the main averments contained in the first, the second count stated that appellants when requested to deliver possession of the premises to appellee said they would not construct or build said building and thereupon appellees procured other buildings, which were the only buildings they were able to procure for the purpose of a garage and that the same cost them \$100 per month rent for a term of five years; that they were unable to secure said premises at a

to be completed on or about October 1, 1914 but they failed.

It was the same and appellees, when the lease on the

building occupied by them, expired, rented other premises, which they claim were the only premises available for their

business they could get which cost them a rental of \$100

month, and for which they paid a lease for the same term

of five years as their lease, the appellees.

It is said that the building they procured was not as suitable

and convenient for their business, as the one appellees

had agreed to build for them and on June 24, 1914 they

presented this suit for damages which they claim to have

received as reason of the breach of the lease on the part of

appellees. It is said that appellees had no other premises

at the time of the breach, after making

and the lease in full, stated that appellees had always

been able and willing to fully keep and perform all of the

promises on their part to be kept and performed and to pay

rent in accordance with the terms of the lease, that on

August 1, 1914, they requested appellees to deliver to

them possession of said building and premises but that

appellees, contrary to the lease and contract, then did not

at said time or afterwards, deliver to them the possession

and occupation of said building and premises. In addition

to the main averments contained in the first, the second

count stated that appellees when requested to deliver pos-

session of the premises to appellees said they would not con-

struct or build said building and premises upon appellees pro-

posed that building, which were the only buildings they

were able to procure for the purpose of carrying on and that

the same cost them \$100 per month rent for a term of five

years. They were unable to secure other premises at a

lesser rent and were thereby damaged \$1200, and in addition were damaged the further sum of \$1800 by reason of the failure of appellants to deliver the premises leased and the inability of appellees to procure other premises so suitably located and constructed for garage purposes. The third count was substantially the same in its allegations as the second but stated that the appellees, by reason of the default of appellants in the respects named, were deprived of large gains and profits which would otherwise have accrued to them; and that they also lost and were deprived of the value of said leasehold. By an amendment to the second count it is alleged that by the default of appellants, appellees were required to rent temporarily another room for show purposes and that they were deprived of and lost gains and profits which they would have received from certain contracts and agreements between them and certain owners of automobiles for the storage of said automobiles on the premises leased by appellants to appellees.

There was no question raised as to the execution of the lease and it appeared that the contemplated building had never been constructed up to the time of the trial. No sufficient reason appears from the proof why appellants failed to put up the building agreed upon according to their contract. It is contended, however, by appellants, and they produced proof to show, that they received two bids for the building in October which were rejected on the ground that the cost was prohibitive; that they took the matter up with appellants as to cheaper brick and less cost and that as a result other plans were made, which made the cost within limits the appellants thought reasonable and which they could afford to pay in consideration of the rent to be received

... and were ...
... the further sum of \$2500 ...
... of appellants to deliver ...
... of appellants to procure other premises ...
... and contacted for ...
... was substantially the same in its ...
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... of appellants in the ...
... and appellees which would otherwise have ...
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... building in October which were rejected on the ground that ...
... the cost was prohibitive; that they took the matter up with ...
... appellants as to cheaper brick and less cost and that as a ...
... other plans were made, which made the cost within ...
... appellants thought reasonable and which they could ...
... pay in consideration of the rent to be received

by them under the lease; that they are ready to put up this building but were informed by one of appellees about, or before, March, 1917 that he had made other arrangements for leasing a garage; that appellants at no time abandoned the project but were making every reasonable effort to construct the contemplated building. It will appear from the above, however, that the first bids were not received until after the time the building was to have been completed by the terms of the contract and no steps towards the actual construction of the building had been taken up to the time of the trial. The only excuse apparently offered by appellants for not constructing the building was that they were unable to have it put up at a price which would seem satisfactory to them and at the time the suit was brought no contract for the building had been let. Proof introduced by appellees showed that prior to the time appellees procured the lease to other premises, appellants told them they would not build the building contemplated. The proof further shows that the only premises suitable for the purposes for which appellees wished to use them they could obtain, cost them \$100 a month rent and that they made a lease for such premises for said amount for the same term of five years as the lease they had made with appellants. The proof also appeared to show although there was some controversy upon this subject that the building which appellees leased, was not as suitable or convenient for their business as the one appellants had agreed to build for them; that appellees had made certain contracts for storage of automobiles for the winter months, which they were unable to carry out because of the default of appellants and the inability of appellees during the winter of 1916 and '17 to procure a garage large enough to carry out

such contracts. The evidence plainly called for a verdict from the jury in favor of appellee and it appears upon the whole to have warranted the amount found by the jury.

Upon the trial appellants offered to prove that the cost of the building which was to be constructed, should be such as to net them ~~the~~ ten per cent on the investment. This offer was refused by the court and appellant insists that in doing so the court erred. It is very doubtful whether under the circumstances of this case such evidence was competent in any event, but the proof shows that appellee O.R. Buford, testified that at the beginning of the negotiations he told appellants he was willing to pay ten per cent on the investment and appellant William Bruchhauser testified in speaking of bids for the construction of the building, "I told Buford these bids were entirely too high to net us a ten per cent investment and Buford said he was willing to give a ten per cent investment, that we should have that". It thus appears that evidence was really admitted which covered the question above referred to and that appellants must have received the full benefit of the same, so that if part or all of it was refused on another occasion no harm was done them. While appellees had a right under the proofs to recover from appellants damages for the pecuniary loss sustained by them, by reason of appellants failure to comply with the terms of the lease, yet it was the duty of appellees to use reasonable efforts to prevent the occurrence of such loss or to lessen it by obtaining other premises in which to carry on their business. *Dobbins v. Duquid*, 65 Ill. 464; *Green v. Williams*, 45 id. 206. This, however, appellees did by renting other premises as near like those appellants agreed to furnish them as they could find and under such

each contract. The evidence clearly called for a finding that the law in favor of appellee and it appears upon the whole that the amount awarded by the jury was not excessive. The trial court's judgment should be affirmed. The evidence was so connected, should be so connected, and the ten per cent on the investment. The fact was stated by the court and evidence before it in doing so the court erred. It is very doubtful whether under the circumstances of this case such evidence was competent in any event, but the record shows that appellee testified that at the beginning of the negotiations he had a 10 per cent interest in the building. However, appellee William Bruchman testified that he had a 10 per cent interest in the building. The fact that these shares were entirely too high to set at a 10 per cent investment and Buford said he was willing to give a 10 per cent investment, that we should have found it thus appears that evidence was really admitted which covered the question above referred to and that appellee must have received the full benefit of the same, so that it is of all of it was retained on another occasion as from the same, then. While appellee had a right under the property to recover from appellee damages for the property lost by them, by reason of appellee's failure to comply with the terms of the lease, yet it was the duty of appellee to use reasonable efforts to prevent the occurrence of such loss or to lessen it by obtaining other premises in which to carry on their business. *Dobbins v. Munday*, 63 Ill. 460; *Green v. Williams*, 40 Ill. 206. That, however, appellee did not attempt to obtain other premises as near like those relinquished as they could find and under such

circumstances they were entitled to recover the excess rent from their landlord. It would appear also that under the proofs in this case and as appellees had an established business, they were entitled to recover damages for the loss of profits which would have accrued to them under their lease with appellants. While remote or speculative damages cannot be recovered, yet where premises were leased for the particular business in which the tenant was engaged, damages sustained by loss of the prospective profits which it is shown by the proofs, would accrue to the tenant, are not to be considered as remote or speculative. 3 Southernland on Damages, 4th Ed. sec. 867; C.C.C. & St.L.Ry.Co.v. Wood 189 Ill.352.

Objections are made by appellants to certain proof introduced by appellees bearing upon the question of loss of profits but we are inclined to believe that all this evidence was competent. If it were not competent, however, appellants could not take advantage of any error involved in its admission for the reason that their objections to such proof were all general. Counsel for appellees insist that no other ground of objection was stated to suchproof, than that it was improper and immaterial and so far as we are able to discover, this claim is correct. In C. & E.I.R.R Co. v. Wallace, 202 Ill.129, it is said, "It has been so often held by this court that objections to evidence must be specific, that it has become the doctrine of this court. The rule is that the party making the objections must point out specifically those insisted on and thereby put the adverse party on his guard and afford him an opportunity to obviate them". In Andrewzewski v. The Gallatin Coal & Coke Co., 143 Ill.App.418, the court quotes approvingly the

...entitled to recover the expenses of
...their landlord. It would appear also that under the
...in this case and as appellees had an established
...they were entitled to recover damages for the fees
...which would have been paid to them under their lease
...while remote or speculative damages cannot
...yet where premises were leased for the purpose
...in which the tenant was engaged, damages are
...of the prospective profits which it is shown
...would accrue to the tenant, are not to be
...remote or speculative. ...
...4th May 1897, 101 N.E. 2d 100
...and ...
...objections are made by appellees to certain proof
...introduced by appellees bearing upon the question of loss
...but we are inclined to believe that all this evi-
...it was not competent. If it were not competent, however,
...could not take advantage of any error involved
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...were all general. Counsel for appellees insisted
...of objection was stated to each point,
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...able to discover, this claim is correct. ...
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...specifically those instructions and thereby of the
...adverse party on his stand and afford him an opportunity
...to controvert them. In the case of ...
...the court proper approvingly the

following language used in O. & M. Ry. Co. v. Walker, 113 Ind. 196, "Objections to evidence to be of any avail must be reasonably specific. The particular objection must be fairly stated. It is not enough to state that the evidence is incompetent or that it is immaterial and irrelevant".

Complaint is made by appellants of a number of the instructions given for appellees. No. 1 is said to be erroneous in considering the question of damages, it being said that this was error for the reason that such damages were special and not declared for. Upon the trial of the case, at the conclusion of the argument of appellants counsel, attorneys for appellees moved to amend their declaration by inserting matter which directly covered their claim for damages for profits which they were to receive from the storage of automobiles, but the court refused to allow this amendment to be made. We are of opinion, however, that the third count of the original declaration which counted on the fact that by reason of the failure of appellants to construct the building in question, "plaintiffs lost and were deprived of large gains and profits which would have accrued to them if the defendants had kept and performed their promises to the plaintiffs", was sufficient to entitle appellees to introduce evidence of any claimed loss suffered by them by reason of contracts made for the storing of cars and that the instruction in question was therefore proper. What is here said will also dispose of similar objections to other instructions. Instruction No. 7 is as follows: "In this case the defendants did not deny that they made executed and delivered the lease set out in the declaration and if the jury believes that the defendants failed or refused to comply therewith, without fault on the part of the plaintiffs, and that the plaintiffs

... in O. & N. Ry. Co. v. Walker, 113 Ind.
... evidence to be of any avail must be
... specifically specified. The averment of fact in this
... It is not enough to state that the evidence is in-
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... Complaint is made of appellants of a number of the
... given for appellants, No. 1 is said to be an
... in considering the question of damages, it being said
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... of the argument of appellants' counsel, et-
... to amend their declaration by in-
... which directly covered their claim for damages
... which they were to receive from the estate of
... but the court refused to allow this amendment
... We are of opinion, however, that the trial court
... which counted on the fact that
... appellants to construct the build-
... and were deprived of large
... and profits which would have accrued to them if the
... had kept and performed their promise to the plain-
... sufficient to entitle appellants to introduce evi-
... by them by reason of non-
... of care and that the instruction
... was therefore proper.
... of similar objections to other instructions.
... Instruction No. 7 is as follows: "In this case the defendant
... that they made executed and delivered the lease
... in the declaration and it the jury believed that the
... or refused to comply therewith, without
... on the part of the plaintiff, and that the plaintiff

were ready, able and willing to comply therewith on their part, then you should find the issues against the defendants and for the plaintiffs." The criticism of this instruction is that it calls for a verdict of the jury upon their belief without regard to the evidence. Of course this instruction would have more clearly satisfied the rules of law had it required the jury to base their belief upon the evidence in the case, but the omission of this requirement in said instruction does not constitute reversible error here, for the reason that their beliefs must be based upon the evidence and therefore no injury could have accrued to appellants in that regard. We have examined the complaints made by appellants of other instructions given for appellees, but none of them appear to us to contain any error of moment.

Appellants' complaint of the refusal of the court to give their instruction No. 32 which told the jury that appellees claims for damages arising from the loss of certain storage contracts, could not be allowed for the reason that they were not covered by plaintiffs declaration, is without foundation as appears from what we have above said concerning the scope of the declaration upon this question.

From a careful consideration of the record in this case we conclude that the judgment should be and it accordingly is affirmed.

Affirmed.

Not to be reported in full.

...the jury should be left to decide for itself on the basis of the evidence. The existence of this instruction is that it calls for a verdict of the jury upon their belief without regard to the evidence. Of course, the instruction is more clearly satisfied and more we had it required the jury to base their belief upon the evidence in the case, but the omission of this requirement of said instruction does not constitute reversible error here, for the reason that their belief must be based upon the evidence and therefore no injury could have occurred to the appellant in that regard. We have examined the instruction given by the appellate court of other instructions given for the purpose of the appeal, but none of them appear to us to contain any reversible error. The court refused to grant the appellant's complaint of the refusal of the court to give their instruction No. 32 which told the jury that the appellant's claims for damages arising from the loss of certain contracts, could not be allowed for the reason that they were not covered by plaintiff's declaration, is without foundation as appears from what we have above said. The scope of the declaration upon this question, from a careful consideration of the record in this case we conclude that the judgment should be and it accordingly is affirmed.

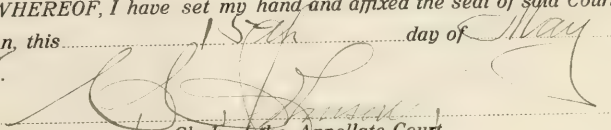
Affirmed.

to be reported in full.

See also the case of the appellant.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of May A. D. 191⁹.


Clerk of the Appellate Court

OPINION

EE. S

being denied
3/26/19

411a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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.....
John J. Crawshaw,
.....
Appellee
.....
.....
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.....
.....
vs.
No. 64
March Term, 1918.
.....
.....
St. Louis Electric Terminal Ry. Co.,
Appellant
.....
.....
.....

213 I.A. 690

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 64.

In the Appellate Court,

Agenda 36

State of Illinois, Fourth District

March Term, A. D. 1918.

John J. Crawshaw,
Appellee,

vs.

St. Louis Electric Terminal
Railway Company,
Appellant.

213 I.A. 690

Appeal from the Circuit Court
of Madison County, Illinois.

McBride, J.

The appellee recovered a judgment against the appellant in the Circuit Court of Madison County, Illinois, for damages sustained to his automobile by appellant's car at the junction of Twenty-third and C Streets in Granite City, Illinois.

It appears from the record in this case that Twenty-third Street is one of the public streets of Granite City extending east and west and upon which appellant has constructed its street car line and operates its cars. C Street crosses Twenty-third Street practically at right angles and is a paved street and one of the public thoroughfares of Granite City upon which there is much travel. There are a number of residences on the west side of C Street, both north and south of Twenty-third Street, one of which residences is located on the northwest corner of the intersection; it is called by the witnesses the Coudy house; another house on the southwest corner of the intersection is called by them the McKeever house. West of the intersection were a number of sycamore trees, twelve or fifteen inches in diameter, which extended up above the top of the street cars. Some of the witnesses tes-

March Term, A. D. 1918.
 State of Illinois, Fourth District
 in the Appellate Court,
 Agenda 38

2131.A.690

James J. Crowshaw,
 Appellee.

Appeal from the Circuit Court
 of Madison County, Illinois.

St. Louis & North Western
 Railway Company,
 Appellant.

Findings.

The appellee recovered a judgment against the appel-
 lant in the Circuit Court of Madison County, Illinois, for
 damages sustained to his automobile by appellant's car at
 the junction of Twenty-third and C Streets in Granite City,
 Illinois.

It appears from the record in this case that Twenty-
 third Street is one of the public streets of Granite City ex-
 tending east and west and upon which appellant has constructed
 its street car line and operates its cars. C Street crosses
 Twenty-third Street practically at right angles and is a paved
 street and one of the public thoroughfares of Granite City
 upon which there is much travel. There are a number of resi-
 dences on the west side of C Street, both north and south of
 Twenty-third Street, one of which residences is located on
 the northwest corner of the intersection; it is called by the
 witnesses the Gandy house; another house on the southwest cor-
 ner of the intersection is called by them the Holmeyer house.
 West of the intersection were a number of spruce trees,
 twelve or fifteen inches in diameter, which extended up
 above the top of the street cars. Some of the witnesses test-

tified that these trees tended to darken the street as the limbs extended out into the street.

On the evening of June 12th, 1917, at about the hour of 7:30 appellant was running one of its street cars with a trailer east and across C Street. At the same time appellee was coming south on C Street and reached the car line just as the street car was passing. Appellee attempted to avoid the collision by swerving his automobile to the left, but was unable to get out of the way and the street car caught the automobile and drug it a distance of about eighty feet and badly damaged the machine. There was much evidence introduced upon the trial of the case as to the negligence of appellant and due care of appellee, but the testimony was very conflicting. The case was tried by a jury and verdict and judgment rendered in favor of appellee for Three Hundred and Seventeen Dollars, which the appellant seeks to reverse by this appeal.

The declaration upon which the trial was had consisted of two counts, the first charging the negligent and careless operation of the street car upon Twenty-third Street and across C Street, and the second that the car was operated at a high and dangerous rate of speed across C Street without sounding any gong or other warning. The declaration in each count also alleged that the plaintiff was in the exercise of due care.

The principal question made and argued by counsel for appellant is that the appellant was not guilty of the negligence charged, but that appellee was guilty of contributory negligence, and that the verdict of the jury was manifestly against the weight of the evidence. There were five witnesses introduced by appellee, who testified in effect that

filled that these trees tended to darken the street as the
lights extended out into the street.

On the evening of June 12th, 1917, at about the
hour of 7:30 appellant was running one of its street cars with
a driver east and across C Street. At the same time appellee
was coming south on C Street and reached the car line just

as the street car was passing. Appellee attempted to avoid

the collision by swerving his automobile to the left, but

was unable to get out of the way and the street car caught

the automobile and drew it a distance of about eighty feet

and badly damaged the machine. There was much evidence in-

duced upon the trial of the case as to the negligence of

appellee and due care of appellee, but the testimony was

very conflicting. The case was tried by a jury and verdict

and judgment rendered in favor of appellee for three hundred

and fifty dollars, which the appellant seeks to reverse

by this appeal.

The declaration upon which the trial was had con-

sisted of two counts, the first charging the negligent and

careless operation of the street car upon Twenty-third Street

and across D Street, and the second that the car was operated

at a high and dangerous rate of speed across C Street without

sounding any gong or other warning. The declaration in each

count also alleged that the plaintiff was in the exercise of

due care.

The principal question made and argued by counsel

for appellant is that the appellant was not guilty of the

negligence charged, but that appellee was guilty of contrib-

utory negligence, and that the verdict of the jury was mani-

festly against the weight of the evidence. There were five

witnesses introduced by appellee, who testified in effect that

the street car, as it crossed C Street, was being operated at from twenty to twenty-five miles per hour, and seven witnesses, including those above referred to, testified that the automobile was being operated at from six to ten miles per hour. Several of these witnesses stated that no gong was sounded and that the appellee swerved his automobile to the left just before it was struck by the car, and that the automobile was carried east a distance of about eighty feet beyond the crossing by the car. One witness, Clifford Smith, also testified that the motorman was not paying attention to his business at that time. He stated that when they passed the street west of C Street the motorman's wife gave him a basket containing a lunch and that between the two streets the motorman was engaged in looking into that basket and not looking out at the people who might be passing upon the street or crossing the railroad, and that the motorman did not know that the automobile was approaching until this witness called to him and told him to look out or he would kill those people, referring to the people in the automobile that were crushed and were then approaching the railroad tracks. The motorman, however, denies that he was engaged in looking into the basket, as testified to by Smith, and several witnesses, who testified on behalf of appellant, stated that they were there and did not see Clifford Smith. The appellee, however, introduced three witnesses, C.J.Kramer, Georgia Kramer and James Patterson, all of whom stated they knew the witness Smith, and that he was present on the car at the time of the collision

Upon the other hand, appellant introduced seven or eight witnesses, who testified that the street car was being operated at a speed of six to ten miles per hour, and the most of these witnesses also stated that they saw the auto-

at about 10:30 a.m. on the morning of the collision, as it occurred at about 10:30 a.m. and seven witnesses, including those above referred to, testified that the automobile was being operated at from six to ten miles per hour. That several of these witnesses stated that no car was visible to him at that time, and that the automobile was struck by the car, and that the automobile was carried over a distance of about twenty feet beyond the crossing by the car. One witness, Clifford Smith, also testified that the motorist was not paying attention to his business at that time. He stated that when they passed the street view of the street the motorist's wife gave him a package containing a lunch and that between the two streets the motorist was engaged in looking into that basket and not looking out at the people who might be passing upon the street or crossing the railroad, and that the motorist did not know that the automobile was approaching until this witness called to him and told him to look out or he would kill these people. Testimony to the people in the automobile that were crushed and were then approaching the railroad tracks. The motorist, however, denies that he was engaged in looking into the basket, as testified to by Smith and several witnesses, who testified on behalf of appellants, stated that they were there and saw the automobile. The witnesses, however, testified that they saw the automobile. All of whom stated they knew the witness Smith, and that he was present on the car at the time of the collision. Upon the other hand, appellants introduced seven or eight witnesses, who testified that the street car was being operated at a speed of six to ten miles per hour, and that most of these witnesses also stated that they saw the collision.

mobile and it was being run at the rate of twenty-five to thirty miles per hour, and also that they heard the motorman ring the gong at about the time he approached this street. The motorman also testified that just before the collision he applied the air brake, but was not able to prevent the collision. He also said he applied the air brake as soon as he saw the automobile. It is almost impossible to conceive of testimony coming from many different witnesses being so contradictory as the testimony of the several witnesses in this case. Practically all of the witnesses introduced by the appellee upon the question of the speed of the car and the speed of the automobile fixed the speed of the car at a high and dangerous rate, while all of those called by the appellant, and above referred to, fixed the speed of the car at a very moderate rate and that of the automobile at an excessive and dangerous speed.

It is almost impossible for a Court, upon the reading of this record, to determine who was and who was not telling the truth about this matter. So far as we can see one set of witnesses had no advantages over the other in seeing and knowing what transpired. One set or the other of the witnesses have badly misrepresented the facts in this case, and, as we understand the law, juries are organized for the purpose of listening to the testimony of the witnesses, observing their bearing upon the witness stand, and from all the facts and circumstances surrounding and connected with the trial to determine who is telling the truth about the matter. We take it that there is an irreconcilable conflict in the testimony of the witnesses for appellant and appellee upon the question of the negligence of the appellant and due care of the appellee. Wherever there is a conflict of testimony, and even though the

...and it was being run at the rate of twenty-five to thirty miles per hour, and also that they heard the motor ...
...also testified that just before the collision he ...
...the car ... but was not able to ...
...he ...
...it is almost impossible ...
...testimony ...
...as the testimony of the several witnesses in this case ...
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...upon the question of the speed of the car and the speed of the automobile ...
...the speed of the car at a high and ...
...the speed of the car at a very ...
...rate and that of the automobile at an excessive and ...
...speed ...
...it is almost impossible for a Court, upon the reading of this record, to determine who was and who was not telling the truth about this matter. No far as we can see one set of witnesses had no advantage over the other in seeing and knowing the facts transpired. One set or the other of the witnesses have badly misrepresented the facts in this case, and, as we understand the law, juries are organized for the purpose of listening to the testimony of the witnesses, observing their bearing upon the witness stand, and from all the facts and circumstances surrounding and connected with the trial to determine who is telling the truth about the matter. We take it that there is an irreconcilable conflict in the testimony of the witnesses for appellant and appellee upon the question of the negligence of the appellant and due care of the appellee. However there is a conflict of testimony, and even though the

greater number of the witnesses testifying to a given fact are in opposition to the verdict rendered by the jury, this will not warrant a Court in interfering with the verdict, unless there is something in the testimony of such a peculiar character as to demonstrate that the verdict was manifestly against the weight of the evidence. Taking the evidence introduced on behalf of appellee alone, it is sufficient to support a verdict. In matters of this character the Supreme Court of this State has said: "If any rule of Court can be so well established as to be neither questioned, nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence and the facts and circumstances by fair and reasonable intendment will authorize a verdict, notwithstanding it may appear to be against the strength and weight of the testimony.....this Court will not reverse the judgment of the trial court where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict." *Shevalier v. Seager*, 121 Ill., 564.

While it is true that in this case more witnesses testified on behalf of appellant as to the negligence of appellant and the due care of appellee than did on behalf of appellee, yet there is one fact that stands out in this testimony, that in our judgment gives weight to the testimony of appellee's witnesses as to the rate of speed at which the car was being operated at the time of the collision. It is claimed by appellant that the brakes were set, and it is admitted by all that the car caught hold of the automobile and dragged it a distance of eighty feet. This, in our judgment, was a circumstance of much importance in determining the rate of speed at which the car was being operated. "And the cir-

greater number of the witnesses testifying to a given fact
are in opposition to the verdict rendered by the jury, and
will not warrant a Court in interfering with the verdict, un-
less there is something in the testimony of such a peculiar
character as to demonstrate that the verdict was manifestly
erroneous. Taking the weight of the evidence in-
stead on behalf of appellee alone, it is sufficient to
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Court of this State has said: "If any rule of Court can be
applied as to the weight of the evidence, it is that a ver-
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inference will authorize a verdict, notwithstanding it may
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mony. . . . The Court will not reverse the judgment of the
trial court where the evidence of the successful party, when
considered as a whole, is clearly sufficient to sustain the
verdict." *Shaver v. Sawyer*, 181 Ill. 564.
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testified on behalf of appellee and as to the negligence of ap-
pellant and the care of appellee than did on behalf of
appellee, yet there is one fact that stands out in this case
timely, that in our judgment gives weight to the testimony
of appellee's witnesses as to the rate of speed at which the
car was being operated at the time of the collision. It is
shown by appellant that the brakes were set, and it is ad-
mitted by all that the car caught hold in the snowdrift and
drifted a distance of thirty feet. This, in our judgment,
was a circumstance of such importance in determining the rate
of speed at which the car was being operated, and the cir-

cumstances that the car has run an unusual distance before it stops is some evidence of improper management." Chicago City Railway Company vs. Tucky, 96 Ill.416.

If the theory of the appellee be true, that the car line was shaded so as to prevent him from getting a proper view of the car, and the house near the car line tended to obstruct his vision, and he heard no gong ring, these were matters that the jury had a right to take into consideration, as to whether or not he was in the exercise of due care; this was also purely a question for the jury. After a careful consideration of the evidence in this case we are unable to say, and, as we think, have no right to say, that under the conditions here shown to exist that the verdict was manifestly against the weight of the evidence.

Objection is also made to the ruling of the Court upon the cross-examination of appellee's witnesses when he undertook to inquire if Mrs. Patterson was not giving them the slip, and also in excluding a plat that had been prepared by appellant. We think the Court did not err in refusing to inquire about where Mrs. Patterson was, or was going, and that the refusal to permit the plat in evidence was not error, and while it may have been properly admitted, we do not think it erroneous to exclude it in this case. The surroundings of the intersection of this street with the railroad were simple, and we do not think the jury could have been very materially benefitted by any plat that could have been introduced in evidence.

Appellant also offered to prove by Dr. Schwartz that he owned the same kind of an automobile that was being driven by the appellee on this occasion. The appellant introduced Dr. Schwartz upon the witness stand, and after prov-

...the car was not an unusual distance before
...evidence of ... Chicago
...Railway Company vs. Tracy, 32 Ill. App. 2d 111.

...the theory of the appeal is that the
...line was shaded ... as to prevent him from getting a proper

...of the car, and the house near the car line ...
...his vision, and he heard no bang ... were

...that the jury had a right to take into consideration
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...

...also offered to ... by Dr. ...
...owned the same kind of an automobile ... was being

...the appellee on this occasion. The appellee in-
...upon the witness stand, and after pro-

ing by him that he was a retired dentist and drove an automobile, a five passenger Saxon six, 1916 model, the same as driven by appellee, then asked him this question: "Doctor, have you made a test on a paved street to ascertain in what distance you could stop your automobile running at a rate of not to exceed ten miles an hour?" The appellee objected to this question. The objection was sustained, and we think properly so. There might have been circumstances surrounding the particular machine of Dr. Schwartz' that would have enabled him to tell at what distance his machine could have been stopped, but would not be material in determining at what distance appellee's machine might have been stopped under other conditions. While a question might have been framed that would elicit information as to what distance a machine of this character could be stopped, we do not think this was a proper question, and the Court did not err in sustaining the objection.

The appellant asked the Court to give the following instruction, to-wit: "The Court instructs you that the fact that the defendant may have introduced evidence on, or argued the question of, the amount of damages, or that the Court may have given instructions with reference to the question of damages, should not be considered by the jury as an intimation by the Court, or an admission by the defendant that the plaintiff is entitled to recover." We think the Court may well have given this instruction, but we do not think it reversible error to refuse it, as the jury certainly had no right to infer from the instructions given that the Court made any intimation whatever of the defendant's right to recover. The jury was told in plain terms in several other instructions offered by the defendant, that before the plaintiff could re-

and by him that it was a retired dentist and drove an auto-
 mobile, a five passenger Buick six, 1916 model, the same
 as driven by appellee, then asked him this question: "Doctor,
 have you made a test on a paved street to ascertain in what
 distance you could stop your automobile running at a rate
 of 10 to 20 miles an hour?" The appellee objected to
 this question. The objection was sustained, and we think
 properly so. There might have been circumstances surrounding
 the particular machine of Dr. [redacted] that would have en-
 abled it to tell at what distance his machine could have
 been stopped, but would not be material in determining at
 what distance appellee's machine might have been stopped
 under other conditions. While a question might have been
 framed that would elicit information as to what distance a
 motor of this character could be stopped, we do not think
 this was a proper question, and the Court did not err in sus-
 taining the objection.
 The appellant asked the Court to give the following
 instruction, to-wit: "The Court instructs you that the fact
 that the defendant may have introduced evidence on, or argued
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 error to refuse it, as the jury certainly had no right to
 infer from the instructions given that the Court made any in-
 dication whatever of the defendant's right to recover. The
 jury was told in plain terms in several other instructions
 offered by the defendant, that before the jury it could re-

cover he must prove the negligence charged in the declaration by a preponderance of the evidence.

It was next insisted that the Court erred in its refusal to submit a fourth special interrogatory, which is as follows: "Did the plaintiff know that a street car was approaching the intersection in time for the automobile to have stopped before getting on the track, if at the time the automobile had been running at a rate of speed not greater than was reasonable and proper, having regard to the traffic and use of the way, or so as not to endanger the life or limb or injure the property of any person?" We think the Court did right in refusing this interrogatory. It was complicated, and in a manner argumentative, and was not single and direct as the Supreme Court requires interrogatories to be. The Supreme Court says: "A question for special finding should be single and direct and relate to an ultimate and controlling fact in the ~~X~~ case, and not to an evidentiary fact or facts from which the ultimate fact may be deduc~~ed~~ed by reason or argument." Illinois Steel Company vs. Mann, 197 Ill.189. We do not believe this interrogatory conformed to the requirements of the Supreme Court in such cases.

The jury were the better judges of the testimony from having seen the witnesses upon the stand and observed their apparent fairness, or want of fairness, knowledge, ability and general demeanor as to who was telling the truth, than we can be from the reading of the record, and we are of the opinion that the verdict of the jury must be taken in this case as a correct finding of the facts. At least we cannot say that the verdict is manifestly against the weight of the evidence. We do not believe that the Court committed any reversible error upon the trial of this case, and the judgment of the lower Court should be and is affirmed. AFFIRMED.
Not to be reported in full. -8-

over he must prove the negligence charged in the complaint.

tion by a preponderance of the evidence.

It was next insisted that the Court erred in its

is now, yesterday, today and tomorrow.

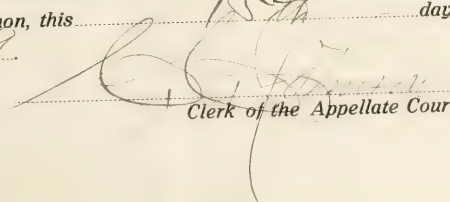
... follows: "Did the plaintiff know that a street car was

proaching the intersection in time for the automobile to

Not to be destroyed or lost

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1917


Clerk of the Appellate Court

OPINION

EE.S



4120

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

213 I.A. 690

W. E. Moore, Conservator, et al.,

Appellees

**ERROR TO
APPEAL FROM**

vs.

Circuit COURT

No. 1.
October Term, 1918.

Wayne COUNTY

J. B. Harris et al.,

Appellants

TRIAL JUDGE

HON. J. C. EAGLETON

October Term, 1918.

W. E. Moore, Conservator,)

Appellee)

v.)

J. B. Harris, et al,)

Appellants)

213 I.A. 690

Appeal from Wayne.

Opinion by Higbee, D. J.

---oOo---

W. E. Moore, Conservator of Mary E. Moats, appellee, filed a bill in chancery in the circuit court of Wayne county, against J. B. Harris, appellant, and Mary E. Moats, to set aside a judgment by confession in that court in favor of appellant and against said Mary E. Moats, upon a note executed by her to appellant in payment of attorney's fees and expenses in procuring her discharge from an insane asylum and in conducting certain litigation for her.

On February 17, 1913, while Mrs. Moats was in a hospital at Mt. Vernon, Illinois, appellee, a brother, filed a petition in the county court of Jefferson county to have inquiry made as to her mental condition. A commission of physicians was appointed, Mrs. Moats was adjudged insane and committed to the institution now designated as the Anna State Hospital. Mrs. Moats property being in Wayne county, appellee filed a petition in the county court of that county, and was appointed her conservator. Mrs. Moats remained in the institution named from February 18, 1913 to September 12, 1914. During that time she corresponded with a former neighbor and old friend, Mrs. George Beshears, of Granite

October Term, 1913.

2131.A.000
Appeal from Wayne.

W. E. Moore, Conservator,
Appellee
J. B. Harris, et al,
Appellant

Opinion by Higbee, P. J.

---000---

W. E. Moore, Conservator of Mary E. Moats, appel-
lee, filed a bill in chancery in the circuit court of Wayne
county, against J. B. Harris, appellant, and Mary E. Moats,
as set aside a judgment by confession in that court in
favor of appellant and against said Mary E. Moats, upon a
note executed by her to appellant in payment of attorney's
fees and expenses in procuring her discharge from an insane
asylum and in conducting certain litigation for her.
On February 17, 1913, while Mrs. Moats was in a
hospital at Mt. Vernon, Illinois, appellee, a brother, filed
a petition in the county court of Jefferson county to have
an inquiry made as to her mental condition. A commission of
physicians was appointed, Mrs. Moats was adjudged insane
and committed to the institution now designated as the Miss
State Hospital. Mrs. Moats properly being in said county,
appellee filed a petition in the county court of that county,
and was appointed her conservator. Mrs. Moats remained in
the institution named from February 18, 1913 to September 12,
1914. During that time she corresponded with a former
neighbor and old friend, Mrs. George Newman, of Granville

City, Illinois and through her learned of appellant, an attorney of the latter place, and caused Mrs. Beehears to consult him for the purpose of procuring her release from that institution and again obtaining control of her property. Appellant undertook the work and being unable to get the state Board of Administration to investigate Mrs. Moats' case, examined the records of the county courts of Jefferson and Wayne counties and consulted Mrs. Moats at the institution. Following that investigation and consultation appellant prepared a petition for a writ of habeas corpus, which on August 25, 1914, was signed and sworn to by Mrs. Moats before a notary public, and on August 28, 1914 presented to Judge William N. Butler of Cairo, one of the Judges of the First Judicial Circuit of Illinois, included within which is the county of Union where said Anna State Hospital is located. Appellant also procured the services of an alienist, who examined Mrs. Moats and testified on the hearing before Judge Butler at Jonesboro on September 12, 1914. As the result of the hearing the following judgment was entered in the case, "The court finds that the relator, Mary E. Moats, has recovered and is now in a normal condition, and the court further finds from the evidence that the said Mary E. Moats is a sane woman and fully recovered. It is therefore considered and ordered by the court that the said relator, Mary E. Moats, be and she is hereby discharged from the custody of the said respondent, Dr. E. A. Goodner, superintendent of the said Anna State Hospital." After Mrs. Moats' discharge from the hospital she went to Granite City, Madison county, Illinois, where she took up her residence. A short time after moving to Granite City Mrs. Moats agreed with appellant that his fee for service in procuring

and through her learned of appellant, an
activity of the latter place, and caused Mrs. Neese to
summon him for the purpose of procuring her release from
that institution and again obtaining control of her property.
Appellant undertook the work and being unable to get the
Board of Administration to investigate Mrs. Neese,
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and other counties and consulted Mrs. Neese at the insti-
tution. Following that investigation and consultation appel-
lant prepared a petition for a writ of habeas corpus, which
on August 25, 1914, was signed and sworn to by Mrs. Neese
and a notary public, and on August 28, 1914 presented to
William H. Butler of Cairo, one of the judges of the
Circuit Court of Illinois, included within which is
the name of Union where said Anna State Hospital is located.
Appellant also procured the services of an attorney, who
presented Mrs. Neese and testified on the hearing before
Butler at Jonesboro on September 11, 1914. At the
close of the hearing the following judgment was entered in
the case, "The court finds that the relation, Mary E. Neese,
is recovered and is now in a normal condition, and the
court in that finds from the evidence that the said Mary
E. Neese is a sane woman and fully recovered. It is there-
fore considered and ordered by the court that the said
relation, Mary E. Neese, be and she is hereby discharged
from the custody of the said respondent, Dr. J. C. Goodman,
superintendent of the said Anna State Hospital." After
Mrs. Neese's discharge from the hospital she went to "Manie
City, Jackson County, Illinois, where she took up her resi-
dence. A short time after moving to Manie City Mrs. Neese
agreed with appellant that she for service in organizing

her discharge and securing the removal of her conservator should be \$500 and that he should also be reimbursed for all expenses incurred. In the meantime appellant had taken the necessary steps to have the order of the county court of Jefferson county adjudging Mrs. Moats insane rescinded and had filed a petition in the county court of Wayne county to have appellee discharged as her conservator. On September 30, 1914, Mrs. Moats executed and delivered to appellant a judgment note for \$1000 to cover his attorney fee of \$500 and expenses, the surplus, if any, over and above the fee and actual expenses, to be returned to Mrs. Moats. On October 14, 1914, appellant took judgment for the full amount of that note, including \$100 attorney fee, in the circuit court of Wayne county and on the same day appellee filed a bill in the same court to set aside the judgment, alleging fraud and undue influence in procuring the note and power of attorney, that Mrs. Moats was a spendthrift, that the note and judgment were null and void and asking that appellant be restrained from attempting to collect the same.

Before the final hearing in the county court of Wayne county in the proceedings to have appellee discharged as conservator of Mrs. Moats, appellee filed a cross petition alleging that she was a spendthrift and on the hearing she was adjudged a spendthrift. On appeal to the circuit court the judgment of the county court was affirmed and an appeal was prosecuted to this court where the judgment of the circuit court was affirmed. (Moats v. Moore, 199 Ill.App.270.) Appellant answered the bill filed in this case for himself and Mrs. Moats, denying all the material allegations of the same. Upon motion of appellee's solicitor a conservator ad litem was appointed for Mrs. Moats, who filed a formal

... and ...
... and that he should also be reimbursed for
... incurred. In the meantime appellant had taken
the necessary steps to have the order of the county court of
Jefferson county adjudging Mrs. Hosta insane rescinded and
had filed a petition in the county court of Wayne county to
have appellee discharged as her conservator. On September
22, 1925, Mrs. Hosta executed and delivered to appellant a
judgment with tax \$1000 to cover his attorney fee of \$800
and expenses, the surplus, if any, over and above the fee and
expenses to be returned to Mrs. Hosta. On October
15, 1925, appellant took judgment for the full amount of \$8
and costs, including \$100 attorney fee, in the circuit court
of Wayne county and on the same day appellee filed a bill in
the circuit court to set aside the judgment, alleging fraud
and undue influence in procuring the note and power of attorney.
Mrs. Hosta was a spendthrift, that the note and
power were null and void and asking that appellee be re-
stated from attempting to collect the same.
Before the final hearing in the county court of
Wayne county in the proceedings to have appellee discharged
as conservator of Mrs. Hosta, appellee filed a cross petition
alleging that she was a spendthrift and on the hearing she
was adjudged a spendthrift. On appeal to the circuit court
the judgment of the county court was affirmed and an appeal
was presented to this court where the judgment of the cir-
cuit court was affirmed. (Hosta v. Hosta, 192 111 App. 272.)
Appellant answered the bill filed in this case for herself
and Mrs. Hosta, denying all the material allegations of the
same. Upon motion of appellee's solicitor a conservator was
appointed for Mrs. Hosta, who filed a formal

answer for her, whereupon appellant amended the answer by striking the name of Mrs. Moats from the same and having it appear as the answer of appellant only. Appellee introduced in evidence only the records of the said proceedings in the county courts of Jefferson and Wayne counties, while appellant's evidence consisted of the testimony of himself, Mrs. Georgia Leshears, Mary L. Moats and H. S. Burgess and some documentary evidence. The decree found the issues for appellee, that Mary L. Moats was under disability at the time the judgment was confessed, that the note and power of attorney were null and void, set aside the judgment and decreed that appellant pay the costs including at \$50 conservator ad litem fee. J.B.Harris prosecuted an appeal to this court and assigned numerous errors. On September 12, 1914 Mrs. Moats was as the result of said habeas corpus proceeding declared to be sane and she immediately became entitled to a discharge as a matter of right under section 24 of chapter 85 of the Revised Statutes. Following that action a petition was filed in the county court of Jefferson county and an order entered rescinding the judgment of insanity rendered therein before that time. Subsequently a petition was filed in the county court of Wayne county to remove her conservator, the appellee here. On October 27, 1914, appellee filed a cross petition in the last mentioned proceedings to have Mrs. Moats declared a spendthrift under chapter 86 of our statutes which cross petition was sustained, as we have heretofore noted, in this court. The finding on September 12, 1914 fixed and determined the status and rights of Mrs. Moats as far as the previous judgment as to her mental condition was concerned. The only disability ever alleged, up to the time of filing the bill herein, insanity,

answer the first question, the court is
returning the name of Mrs. Hoste from the case and having it
removed as the name of appellant only. Appellate introduced
in evidence only the records of the said proceedings in the
county court of Jefferson and Wayne counties, which ap-
pear to show that the said proceedings were held in the
county court of Jefferson and Wayne counties and some
evidence was introduced. The decree found the answer for
appellant, that Mary E. Hoste was under disability at the
time the judgment was rendered, that the note and power of
attorney were null and void, and also the judgment and de-
crees that appellant pay the costs including \$500 costs.
On September 12, 1914, the court rendered its decision
and the result of said habeas corpus proceeding
was that the court was under disability at the time the
judgment was rendered and the judgment was reversed
to a discharge as a matter of right under section 24 of
chapter 25 of the Revised Statutes. Following that action
a petition was filed in the county court of Jefferson county
and an order entered rescinding the judgment of insanity
entered therein because that time. Subsequently a petition
was filed in the county court of Wayne county to remove her
from the county, the appellee here. On October 27, 1914, ap-
pellant declared a spendthrift under chapter 25
of our statutes which order petition was sustained, as we
have heretofore noted, in this court. The finding on Sep-
tember 12, 1914 fixed and determined the status and rights
of Mrs. Hoste as far as the previous judgment as to her con-
dition was concerned. The only disability ever as-
signed up to the time of filing the bill herein, insanity,

ceased to exist upon the rendition of the judgment of September 12, 1914, and none other was created until November 25, 1914, when Mrs. Moats was adjudged a spendthrift.

The method provided by the statute for the discharge and removal of a conservator cannot be construed so as to continue the disability after it had been removed by the judgment of sanity in the circuit court, that is, while awaiting the discharge and removal of the conservator by the county court. To give it such effect would be to deprive a person sui juris of his rights. The object of the statutory provisions for notice to the conservator, report, discharge or removal, is to close in a proper and orderly way, the business of the ward, conducted during disability, and make a settlement between the conservator and his former ward. Those provisions protect the ward, the ward's property, the conservator and persons doing business with the conservator as such. It would interfere with the proper conduct of the ward's business, during his disability and might embarrass the conservator in his settlement, after removal of the disability, were not time allowed him to report and settle, but it is not necessary to continue the disability after it has been judicially removed, pending the settlement of the conservator and his discharge or removal. The business which the conservator has done for his ward has been done as an officer of the court and under the supervision of the court during the disability of the ward, and it is proper that his settlement be made in court, but when the disability has been removed the conservator's authority ceases and all that remains for him to do is to settle with his former ward. After Mrs. Moats was declared sane her acts were no longer under control of her conservator or even the county court, and his

... to said ... at the ...
... and none other was ... until ...
... 23, 1914, when Mrs. ... was ...
... the method provided by the statute for the ...
... a conservator cannot be ...
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... and removal of the conservator by the ...
... to give it such effect would be to deprive a ...
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... of the ward, conducted during disability, and make ...
... between the conservator and his former ward ...
... one protect the ward, the ward's property, ...
... and persons doing business with the conservator ...
... would interfere with the proper conduct of the ...
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... was declared sane her role was no longer under ...
... of her conservator or even the county court, and his

and its authority and power, based upon her insanity, which a court of competent jurisdiction had declared to have ceased to exist, were at an end. It is true that before the conservator closed his former ward's business and settled with her, Mrs. Moats was found to be under another and different disability, that of being a spendthrift, but there was no charge of such disability as far as the record shows until after the judgment was taken on the note in question on October 8, 1914. The cross petition in the proceedings brought to remove appellee as conservator, alleging that Mrs. Moats was a spendthrift, was filed October 27, 1914 and she was not adjudged a spendthrift until November 25, 1914. By this record on the day the note and power of attorney were executed, September 20, 1914, and up to and including the time of taking the judgment on the note, Mrs. Moats was sane and must be presumed to have been sui juris. Section 14 of chapter 86 of the Revised Statutes provides that "every note, bill, bond or other contract by an idiot, lunatic, distracted person or spendthrift, made after the finding of the jury as provided in section one of this act, shall be void as against the idiot, lunatic, distracted person, drunkard or spendthrift." This section of the Revised Statutes does not apply, because the note and power of attorney were made before Mrs. Moats was adjudged a spendthrift. A contract made with a person under judgment of insanity, made during a lucid interval, may be enforced against him and a person adjudged insane, released from the asylum as improved, with a recovery of reason, without an adjudication or restoration to reason, can make a valid contract. (Stitzel v. Farley, 148 Ill.App.635 and cases there cited.) Mrs. Moats' disability had been removed prior to the execution of

the note and power of attorney and she was capable at that time of making a valid contract. No testimony was introduced to show insanity or other disability of Mrs. Moats after September 12, 1914 and prior to October 8, 1914 and her ability to contract between those two dates seems not known to have been questioned until after the judgment on the note in question was taken. It must follow that Mrs. Moats was capable of making a valid contract at the time she executed the note and power of attorney in question and the note and power of attorney were not void.

Where a party seeks to impeach a judgment and enjoin its collection on the ground of fraud, the burden of proof rests upon him to establish it. *Stout v. Oliver*, 40 Ill.245. Courts of chancery will only use their power to set aside judgments at law when the evidence is very satisfactory and clear that a wrong has been done. *Lewitt v. Lucas*, 42 Ill. 296. It is a well settled principle of law that fraud will never be presumed but that it must be shown. Mrs. Moats had the right to question, through court proceedings the legality of her detention in the Anna State Hospital and the consequent interference with her liberty thereby. She had a right to employ appellant and he had a right to act for her in these proceedings. That he rendered valuable services is not disputed. Mrs. Moats had the right to contest the proceedings to have her declared a spendthrift as such a finding would deprive her to some extent of the enjoyment of her property. With the possible exception of the \$100 attorney fee included in the judgment, which has since been released without expense to Mrs. Moats, we find nothing in the record to show that appellant acted other than in the utmost good faith toward his client.

...and was capable of that ...
...disability of Mrs. Kate ...
...October 8, 1914 and her ...
...it was found that ...
...a valid contract at the time she executed the ...
...attorney in question and the note and power ...
...void. ...
...Where a party seeks to impugn a judgment and ...
...it is ...
...upon him to establish it. *Stout v. Miller*, 60 ...
...Courts of chancery will only use their power to set ...
...judgments at law when the evidence is very satisfactory ...
...that a wrong has been done. *Hawitt v. Lucas*, 42 ...
...It is a well settled principle of law that ...
...be presumed but that it must be shown, ...
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...of her detention in the Anna State Hospital and the ...
...interference with her liberty thereby. She had a ...
...to employ appellants and he had a right to not for her ...
...these proceedings. That he rendered valuable services in ...
...Mrs. Kate had the right to control the pro- ...
...to have her declared a spendthrift as such a finding ...
...would deprive her to some extent of the enjoyment of her ...
...property. With the possible exception of the \$100 attorney ...
...included in the judgment, which has since been released ...
...without expense to Mrs. Kate, we find nothing in the record ...
...to show that appellants acted other than in an honest good ...
...toward the client.

Undue influence means wrongful influence and without discussing the facts further we conclude that there is nothing in the record to justify the trial court in finding that there was undue influence. The evidence in the record as to the value of the service rendered Mrs. Hoats by appellant is to the effect that it was worth from \$400 to \$500 and it was also shown that appellant had paid and agreed to pay \$489.46 in expenses, a total of not less than \$889.46 and not more than \$989.46. "Only so much of any judgment at law shall be enjoined as the complainant shall show himself equitably not bound to pay, and so much as shall be sufficient to cover costs." Rev.Stat.(Murd) chap.69 sec.7. It was error to enjoin the collection of the entire judgment of \$1000 and under the facts it was error to tax the conservator ad litem fee against appellant. We deem it unnecessary to dwell upon the other points raised in the briefs and discussed in the arguments. For the reasons assigned the decree of the circuit court will be reversed and the cause remanded for further proceedings in accord with this opinion.

Reversed and remanded.

Not to be reported in full.

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JAMES H. HARRIS, DECEASED

APPEAL FROM THE DECISION OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE ESTATE OF JAMES H. HARRIS, DECEASED

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

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THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JAMES H. HARRIS, DECEASED

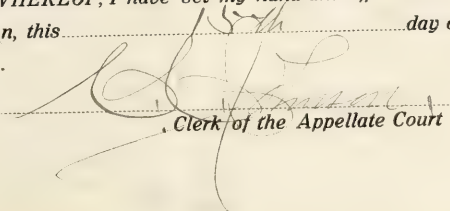
APPEAL FROM THE DECISION OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE ESTATE OF JAMES H. HARRIS, DECEASED

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1917


Clerk of the Appellate Court

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Grace F. Cunningham et al.

Appellants

vs.

No. 4

October Term, 1918.

The First Nat'l Bank of Grayville,

Illinois, Appellee

213 I.A. 691

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Crawford COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

October Term, 1918.

Grace F. Cunningham,

v.

Wilbur F. Ward and Thomas Flynn,

Appellants,

The First National Bank of

Grayville, a Corporation,
Appellee

213 I.A. 201

Appeal from Crawford.

Opinion by Higbee, P. J.

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Grace F. Cunningham, being indebted to Wilbur F. Ward, gave him her three notes, each for \$1000, secured by chattel mortgage. Before the first of the notes and the annual interest on the three became due she was notified by Wilbur F. Ward, one of the appellants, that the notes had been assigned to Thomas Flynn, the other appellant, and was directed to pay the money about to become due to Flynn. She was also advised by the First National Bank of Grayville, Illinois, appellee, that it was the holder and owner of the three notes and was notified to pay the money about to become due to it. She filed a bill of interpleader in the circuit court of Crawford county, making the claimants defendants, brought the money in question, \$1180 into court and asked for the usual relief in such cases.

Ward filed his answer in which he admitted the validity of the notes and mortgage, denied that the bank had any interest in the notes, claimed to be the legal and equitable owner of the notes and that the amount due should be paid to Flynn his assignee, admitted the bank had the

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The First National Bank of
Chicago, Illinois

CONFIDENTIAL

Ward filed his answer in which he admitted the validity of the note and mortgage, denied that the bank had any interest in the note, claimed to be the legal and equitable owner of the note and that the amount due should be paid to him on his demand. He admitted the bank had the note also advised by the First National Bank of Knoxville. He was also advised that it was the holder and owner of the three notes and was notified to pay the money about to become due to it. She filed a bill of interpleader in the circuit court of Crawford county, making the claimants defendants, brought the money in question, \$1500 into court and asked for the usual relief in such cases.

notes in its possession but claimed that it obtained them from him by fraud. His answer also alleged that W. L. Williams was on January 1, 1916 and ever since has been the cashier of the bank, that at that date Williams was the owner of stock in the Southern Oil and Gas Company, a corporation, and desiring to purchase the stock of Ward and George W. Vaden in said company offered to buy and did buy said stock for his individual use, for \$872.73 and the said stock was assigned in blank and delivered to Williams; that Williams paid for said stock by having Ward draw a check for the amount on said bank and present it to his bank and receive credit to his account and when the check reached the bank at Grayville Williams took it up and paid it out of his individual funds; that the check was drawn and the stock paid for in that manner at the suggestion and request of Williams; that relying upon the good faith of Williams, Ward checked on the Grayville bank, although he had no funds there, as Williams well knew, and placed the check for collection in the First National Bank of Carrier Mills for deposit to the credit of his account and the check went through the regular course of collection as practiced by bankers and was paid to Ward; that the check was in full payment for the stock of Ward and Vaden and that Ward paid Vaden his proportionate share thereof; that about March 1, 1916 Williams again sought him and purchased in his individual capacity from him two shares of stock in the Progressive Oil and Gas Company, a co-partnership, in which Williams owned an interest, for \$500; that at the request and under the direction of Williams, Ward was paid for said stock in the same manner as he was paid for the stock heretofore

after in the possession but claimed that it obtained from him by fraud. His answer also alleged that W. I. Williams was on January 1, 1918 and ever since has been the owner of stock in the Southern Oil and Gas Company, a corporation, and desiring to purchase the stock of Ward and George H. Vaden in said company offered to buy and did buy said stock for his individual use, for \$2500.00 and the said stock was assigned to Williams and delivered to Williams; that Williams paid for said stock by having Ward draw a check for the amount on said bank and presenting it to his bank and receive credit to his account and when the check reached the bank at Knoxville Williams took it up and paid it out of his individual funds; that the check was cashed and the stock sold for in that manner at the suggestion and request of Williams; that relying upon the good faith of Williams, Williams checked on the Knoxville bank, although he had no funds there, as Williams well knew, and placed the check for collection in the First National Bank of Knoxville for deposit to the credit of his account and the check was cashed the regular course of collection as practiced by banks and was paid in full; that the check was in full payment for the stock of Ward and Vaden and that Ward paid Vaden his proportionate share thereof; that about March 1, 1918 Williams again sought him and purchased in the same dual capacity from him two shares of stock in the Progressive Oil and Gas Company, a co-partnership, in which Williams owned an interest, for \$250; that at the request and when the division of Williams, Ward was paid for said stock in the same manner as he was paid for the stock purchased

mentioned; that both of said transactions were with Williams in his individual capacity; that Williams became displeased with his purchases and in order to recover the amount paid, \$1372.73, he colluded and conspired with the bank to defraud Ward and compel him to pay the checks which under their arrangement Williams was to pay and did pay as aforesaid; that many months after the payment of the two checks by Williams, about November 20, 1916, the bank by Williams, its cashier, induced Ward to borrow \$3000 from the bank at a low rate of interest, Ward making a property statement and giving three \$1000 notes and a chattel mortgage securing them, as collateral security for his \$3000 note given to the bank as evidence of the debt; that prior to that time Ward had never done business with the bank; that the \$3000 borrowed was placed to his credit; that soon thereafter his check for ~~xxxxxx~~ \$1500 against said fund was suffered to go to protest; that on November 22, 1916, without the knowledge or consent of Ward, the Bank charged \$1627.27 against his account and credited that sum on his \$3000 note and paid the balance of \$1372.73 to Williams with the fraudulent intent of helping Williams recover the price paid for said stock purchased of Ward; that he assigned said three \$1000 notes to Flynn; that Flynn is entitled to the \$1180 due; that Ward does not owe the bank; that his \$3000 note should be cancelled and said three \$1000 notes and chattel mortgage should be delivered to Flynn.

The bank filed an answer admitting the allegations of the bill of interpleader; alleging that the loan to Ward was made in good faith and a credit of \$3000 given him; that out of said sum \$1372.73 was paid on the said two checks of

mentioned, that both of said transactions were with Williams in his individual capacity; that Williams became acquainted with his business and in order to recover the amount of \$1575.73, he obtained and consigned with the bank to Bernard Ward and caused him to pay the check which was their arrangement Williams was to pay and did pay the same; that many months after the amount of the two checks was \$1575.73, the bank by Williams, a bank statement, was delivered to Williams, the cashier, to borrow \$5000 from the bank at a low rate of interest, Ward making a property of the same and giving notes and a chattel mortgage securing them, as collateral security for the \$5000; that the bank as evidence of the debt; that prior to that time Ward had never done business with the bank; that \$1500 borrowed was placed to his credit; that when the bank check for \$1500 against said fund was cashed at the bank, the bank charged the knowledge of Ward, the bank charged Williams to be so present; that on November 22, 1916, with Williams against his account and credited that sum on his account; that the balance of \$1575.73 to Williams with the bank; that of helping Williams recover the same; that the balance of \$1575.73 was paid on the said two checks of the bill of interpleader; alleging that the loan to be made was in good faith and a credit of \$1575.73 given him; that the bank filed an answer admitting the allegations and chattel mortgage should be returned to him.

Ward; that finding the property statement of Ward to be incorrect it credited the balance of the \$3000 account, after payment of the two checks, \$1627.27 on Ward's \$3000 note, leaving a balance of \$1450.74, principal and interest due on the \$3000 note for which it holds the three \$1000 notes and chattel mortgage as collateral security; that it is entitled to hold the same until the balance of the principal and interest of the \$3000 note is paid; that \$1180 is due on said three \$1000 notes; that same should be paid to the bank; that it demanded same from the complainant and alleges that it has not colluded with complainant and asks to be decreed the money brought into court by complainant. Upon application of complainant an injunction was issued. Complainant filed replications to the answers of Ward and the bank. Ward filed a cross bill setting up the same state of facts set up in his answer, making the bank and Flynn defendants, praying the court to decree that Ward is not indebted to the bank, that the bank has no interest in said \$3000 note, that same be cancelled and surrendered to Ward, that the three \$1000 notes and chattel mortgage securing the same be surrendered and delivered to Flynn as assignee of Ward and for other and further relief in the premises. After moving to strike the cross bill the bank answered the same denying the fraud and material allegations thereof. Flynn answered the cross bill setting up his claim to the three \$1000 notes and the chattel mortgage under assignment from Ward. Replications were filed and the case was heard upon the pleadings mentioned, the testimony of numerous witnesses and much documentary evidence. A decree was entered finding that the

mentioned; that both of said transactions were with
 Williams in his individual capacity; that Williams became
 obligated with his purchases and in order to secure the
 amount paid, \$1375.75, he colluded and conspired with the
 bank to induce said bank and compel him to pay the amount which
 under their arrangement Williams was to pay and did pay
 it afterwards; that many months after the payment of the
 amount of \$1375.75, about November 30, 1916, the bank by
 its cashier, James Ward, advised Williams to borrow \$2000 from
 the bank at a low rate of interest, Ward making a property
 statement and giving three \$1000 notes and a chattel mortgage
 as collateral security for the same; that the bank
 gave to the bank an advance of the debt; that prior
 to that time Ward had never done business with the bank;
 that the \$2000 borrowed was given to his credit; that soon
 thereafter the check for \$2000 against said fund was
 returned to him; that on November 30, 1916, with
 out the knowledge or consent of Ward, the bank charged
 \$2000 to Williams' account and credited him on his
 the fraudulent intent of helping Williams recover the same
 said three \$1000 notes to Ryan; that Ryan is entitled to
 the \$1180 due; that Ryan does not owe the bank; that the
 \$2000 note should be cancelled and said three \$1000 notes
 and chattel mortgage should be delivered to Ryan.
 The bank filed an answer admitting the allegations
 of the bill in its entirety; alleging that the loan to Ryan
 was made in good faith and a credit of \$2000 given him; that
 out of said sum \$1375.75 was paid on the said two checks of

Ward; that finding the property statement of Ward to be incorrect it credited the balance of the \$3000 account, after payment of the two checks, \$1627.27 on Ward's \$3000 note, leaving a balance of \$1450.74, principal and interest due on the \$3000 note for which it holds the three \$1000 notes and chattel mortgage as collateral security; that it is entitled to hold the same until the balance of the principal and interest of the \$3000 note is paid; that \$1180 is due on said three \$1000 notes; that same should be paid to the bank; that it demanded same from the complainant and alleges that it has not colluded with complainant and asks to be decreed the money brought into court by complainant. Upon application of complainant an injunction was issued. Complainant filed replications to the answers of Ward and the bank. Ward filed a cross bill setting up the same state of facts set up in his answer, making the bank and Flynn defendants, praying the court to decree that Ward is not indebted to the bank, that the bank has no interest in said \$3000 note, that same be cancelled and surrendered to Ward, that the three \$1000 notes and chattel mortgage securing the same be surrendered and delivered to Flynn as assignee of Ward and for other and further relief in the premises. After moving to strike the cross bill the bank answered the same denying the fraud and material allegations thereof. Flynn answered the cross bill setting up his claim to the three \$1000 notes and the chattel mortgage under assignment from Ward. Replications were filed and the case was heard upon the pleadings mentioned, the testimony of numerous witnesses and such documentary evidence. A decree was entered finding that the

...that finding the property statement of ... to be ...
...is credited the balance of the \$5000 account ...
...of the ... \$1000.00 ...
...having a balance of \$1400.74, ... and ...
...on the \$5000 note for which is held the ...
...on ...
...that it is entitled to hold the same until the ...
...of the principal and interest of the \$5000 note is ...
...that \$1180 is due on said three \$500 notes; that ...
...should be paid to the bank; that it demanded same from ...
...the complainant and alleges that it has not collected with ...
...claimant and asks to be decreed the money property ...
...of complaint. Upon application of ...
...an injunction was issued. ...
...to the answers of Ford and the bank, ...
...still setting up the same state of facts set up in his ...
...making the ... and ...
...decreed that Ford is not indebted to the bank; that ...
...the bank has no interest in said \$5000 note, that same be ...
...cancelled and surrendered to Ford, that the three \$5000 ...
...notes and chattel mortgage accounts the same as ...
...and delivered to Flynn as evidence of Ford and the other ...
...and further relief is the prayer. After moving to ...
...the case will the bank answer the same during the term ...
...and material allegations thereof. Flynn answered the ...
...does still setting up his claim to the three \$500 notes ...
...and the chattel mortgage under assignment from Ford. ...
...actions were filed and the case was heard upon the pleadings ...
...mentioned, the testimony of numerous witnesses and much ...
...evidence. A decree was entered finding that the

bill of interpleader was properly filed, that the facts as alleged in the answer of appellee, the bank, were true, finding the issues against Ward, except as to the assignment of the three \$1000 notes and chattel mortgage, finding the issues against Flynn, except as to the assignment of said three notes and chattel mortgage, that Ward was indebted to the bank for \$1372.73 and interest at five per cent from November 18, 1916, the balance due on the \$3000 note; that the bank rightfully holds the three \$1000 notes and the chattel mortgage securing the same; that the bank was entitled to receive from the clerk the \$1180 deposited with him by the complainant, that the bank was entitled to hold the two unpaid \$1000 notes and chattel mortgage and upon Ward's failure to pay the balance he owes the bank, to collect the two \$1000 notes, apply the proceeds on Ward's debt and pay the remainder to Flynn; that the bank acted in good faith and without wrongful motive or fraud and decreeing that Ward and the bank each pay one-half of the costs.

Numerous errors were assigned but appellants in substance confine their argument to an earnest attempt to show that the judgment of the circuit court is contrary to and against the weight of the evidence. There was evidence tending to prove every material allegation of each party. We think the only question properly raised is one of fact, that is, was the proof sufficient to sustain the decree? There is a sharp controversy between the parties as to the conversation which took place when Ward borrowed the \$3000 and also as to many other material matters. The case therefore depends upon the credibility of the witnesses and the weight to be given their testimony.

There is a sharp discrepancy between the parties as to the conversation which took place when Ward borrowed the \$2000 and also as to many other material matters. The case therefore depends upon the credibility of the witnesses and the weight to be given their testimony.

Where the chancellor tries a case on oral evidence introduced in open court, with the opportunity of seeing and hearing the witnesses testify, the finding of facts by the chancellor is entitled to the same force and effect as the verdict of a jury. *Podolski v. Stone*, 186 Ill. 549; *Wood v. Price*, 46 Ill. 435; *Haskins v. Hesley*, 152 Ill.App. 141 and cases there cited. There was proof tending to support all the findings of the circuit court and as such findings are not clearly and manifestly against the weight of the evidence, we are not at liberty to disturb the same and the decree of the circuit court must be affirmed.

Affirmed.

Not to be reported in full.

1. The Commission has received information from the State Department that the United States has no objection to the proposed exchange of prisoners of war between the United States and the Soviet Union.

2. The Commission has also received information from the State Department that the United States has no objection to the proposed exchange of prisoners of war between the United States and the Soviet Union.

3. The Commission has also received information from the State Department that the United States has no objection to the proposed exchange of prisoners of war between the United States and the Soviet Union.

4. The Commission has also received information from the State Department that the United States has no objection to the proposed exchange of prisoners of war between the United States and the Soviet Union.

5. The Commission has also received information from the State Department that the United States has no objection to the proposed exchange of prisoners of war between the United States and the Soviet Union.

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7. The Commission has also received information from the State Department that the United States has no objection to the proposed exchange of prisoners of war between the United States and the Soviet Union.

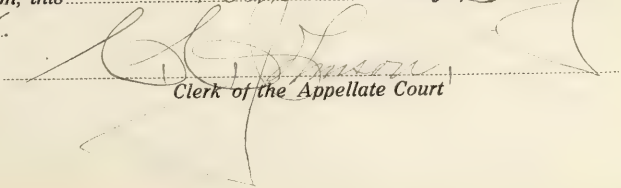
8. The Commission has also received information from the State Department that the United States has no objection to the proposed exchange of prisoners of war between the United States and the Soviet Union.

9. The Commission has also received information from the State Department that the United States has no objection to the proposed exchange of prisoners of war between the United States and the Soviet Union.

10. The Commission has also received information from the State Department that the United States has no objection to the proposed exchange of prisoners of war between the United States and the Soviet Union.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1914


Clerk of the Appellate Court

OPINION

EE. §



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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit: On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

213 I.A. 691

The People of the State of Illinois,
Defendant in Error

ERROR TO
~~APPEAL FROM~~

vs.

County COURT

No. 5
October Term, 1918.

Franklin COUNTY

Albert Falciewsky,
Plaintiff in Error

TRIAL JUDGE

HON. NEALY I. GLENN

October Term, A. D. 1918.

The People of the State of Illinois,

Defendant in Error

v.

Albert Falciewsky,

Plaintiff in Error.

213 I.A. 691

Error to County Court
of Franklin.

Opinion by Higbee, P. J.

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Plaintiff in error, Albert Falciewsky, was indicted in the circuit court of Franklin county, at the November term, 1917, for the sale of intoxicating liquor in anti-saloon territory in said county.

The indictment originally consisted of ten counts, but a nolle prosequi as to four of them was entered in the county court of said county, to which the case appears to have been certified, and plaintiff in error was found guilty on the first two counts. Falciewsky brings the case here by writ of error urging as the principal ground for reversal, that the verdict was not warranted by the facts. Upon the trial the People introduced in evidence the certificate of the town clerk of the town of Frankfort in said county, where said sale was charged to have been made, to show that the same was anti-saloon territory and also the certificate of the collector of internal revenue of the district in which said county was included, showing the issuance of an internal revenue special tax stamp to said Albert Falciewsky as a retail liquor dealer, his place of business being de-

October Term, A. D. 1918.

3131 A. 691

The People of the State of Illinois

Defendant in Error

vs.

Albert Paleyewsky

of Franklin,

Plaintiff in Error.

Plaintiff in Error.

Opinion by Hughes, P. J.

---010---

Plaintiff in error, Albert Paleyewsky, was in-

cluded in the circuit court of Franklin county, at the

October term, 1917, for the sale of intoxicating liquors

in anti-saloon territory in said county.

The indictment originally consisted of ten counts,

but a nolle prosequit as to four of them was entered in the

circuit court of said county, to which the case appears to

have been certified, and plaintiff in error was found guilty

on the first two counts. Paleyewsky brings the case here

by writ of error urging as the principal ground for reversal,

that the verdict was not warranted by the facts. Upon the

trial the people introduced in evidence the certificate

of the town clerk of the town of Franklin in said county,

which said certificate was charged to have been made, to show that

the same was anti-saloon territory and also the certificate

of the collector of internal revenue of the district in

which said county was included, showing the issuance of an

internal revenue special tax stamp to said Albert Paleyewsky

as a retail liquor dealer, his place of business being de-

scribed as being located within said anti-saloon territory. Two witnesses were then introduced by the people, one of whom, Anderson, who appears to have been employed as a detective for the purpose of procuring evidence against Falciewsky, testified to purchasing beer and whisky of plaintiff in error and to have seen another person purchase intoxicating liquors of him. Another witness introduced for the people testified to facts tending to corroborate the testimony of the witness above referred to. Three witnesses were introduced in defense, who sought in a measure to contradict the testimony of Anderson. Their testimony, however, was uncertain and not by any means conclusive. From their statements it is plain that liquor of some kind was being disposed of by plaintiff in error at the place in question, and it was only questionable whether the liquor was intoxicating or was paid for by said Anderson. Upon the whole evidence the jury was fully warranted in finding the accused guilty on the counts named in the verdict.

Plaintiff in error claims the trial court erred in permitting the People to introduce their exhibit E, said by the city attorney when he was examined as a witness, to have been a bottle of whisky which he received from a detective named Kaiser, whom he had employed to procure evidence against the accused. The objection to this exhibit appears to be that the proof did not show that the contents of the bottle was the same as when given to the states attorney ^{by} Kaiser. Lampkin the city attorney, swore that the bottle and contents were the same he received from Kaiser and no one swore to the contrary, so the court properly submitted it to the jury in order that they might determine whether the bottle and the contents were the same as that

ascribed as being located within said anti-alcohol territory.
 Two witnesses were then introduced by the people, one of
 whom, Anderson, who appears to have been employed as a de-
 fensive for the purpose of producing evidence against
 defendant, testified to purchasing beer and whisky at
 defendant in error and to have seen another person purchase
 liquor of him. Another witness introduced
 for the people testified to facts tending to corroborate
 the testimony of the witness above referred to. Three
 witnesses were introduced in defense, who sought in a
 manner to contradict the testimony of Anderson. Their
 testimony, however, was uncertain and not by any means con-
 sistent. From their statements it appears that liquor of
 some kind was being disposed of by plaintiff in error at
 the time in question, and it was only questionable whether
 the liquor was intoxicating or was sold for by said Anderson.
 When the whole evidence the jury was fully warranted in
 finding the accused guilty on the counts named in the verdict.
 Plaintiff in error claims the trial court erred in
 admitting the people to introduce their exhibit B, said
 by the city attorney when he was examined as a witness, to
 have been a bottle of whisky which he received from a de-
 fective named Katsor, whom he had employed to procure evi-
 dence against the accused. The objection to this exhibit
 appears to be that the fact did not show that the contents
 of the bottle was the same as when given to the state
 attorney. In answer the city attorney, swore that the
 bottle and contents were the same he received from Katsor
 and he swore to the contrary, so the court properly
 admitted it to the jury in order that they might determine
 whether the bottle and the contents were the same as that

received by Lampkin. Objection was also made by counsel for the accused to the introduction of the People's Exhibit D, which was a certificate of the Collector of Internal Revenue of the district, in which said Franklin county is included, showing the issuance of an internal revenue special tax stamp as a retail liquor dealer, to the accused. The objection to this certificate is that it is not in form or substance the kind of a certificate which is made by the law, prima facie evidence of guilt for one to have in his possession. The statute upon that subject provides, "The issuance of an internal revenue special tax stamp or receipt by the United States, to any person as a wholesale or retail dealer in liquors or in malt liquors at any place within territory which at the time of the issuance thereof, is anti-saloon territory, shall be prima facie evidence of the sale of intoxicating liquor by such person at such place or at any place of business of such person, within such territory where such stamp or receipt is posted and at the time charged in any suit or prosecution under this act." (Hurd, Rev.Stat.chap.43,par.41). The exhibit referred to stated the name as being Albert Falciewsky, described the lot on which he did business in West Frankfort, Illinois and stated his business as being a retail liquor dealer, all of which was properly certified to by the collector of internal revenue of the district, and appears to us to have fully answered the requirements of the statute above referred to. Plaintiff in error was notified by the People to produce the internal revenue tax stamp or receipt issued to him as a retail liquor dealer by the collector of internal revenue but failed to do so and under the circumstances we think the certificate of the collector above referred to, was properly admitted in evidence.

... was a certificate of the collector of internal
... of the district, in which said certificate is
... showing the issuance of an internal revenue
... stamp as a retail liquor dealer, to the person
... to this certificate is that it is not in
... the kind of a certificate which is made
... evidence of guilt for one to have
... The statute upon that subject provides
... of an internal revenue special tax stamp on
... to any person as a dealer
... in said liquor at any place
... at the time of the issuance thereof,
... shall be prima facie evidence of
... by such person at such
... within
... each stamp or receipt is posted and
... at the time charged in any suit or prosecution under this
... The exhibit referred
... described
... in West Springfield, Illinois
... being a retail liquor dealer,
... by the collector of
... and appears to us to have
... of the statute above re-
... by the books
... stamp or receipt issued
... by the collector of in-
... and under the circumstances
... of the collector above referred to,
... in evidence.

The only other question raised by plaintiff in error is as to an instruction given by the court to the jury concerning the form of their verdict. The instruction in question was as follows: "If you find the defendant guilty the form of your verdict may be 'we the jury find the defendant guilty in manner and form as charged in the indictment in counts No.....(here insert the number of counts on which you find the defendant guilty)'" . The complaint of this instruction is that it would have to be construed by the jury as meaning that if they found the accused guilty at all, they must find him guilty on more than one count and to that extent indicated to them what their verdict should be. We do not think the jury could possibly have been misled in the direction claimed by counsel for plaintiff in error and their criticism of it seems to be hypercritical and without merit. The verdict in this case appears to us to have been fully sustained by the proofs, the trial was conducted without the intervention of material error and the judgment should and will be affirmed.

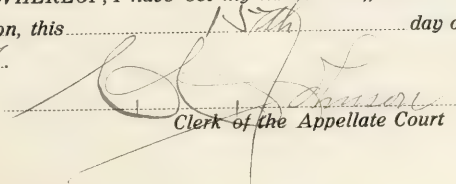
Affirmed.

Not to be reported in full.

...the only other question raised by plaintiff in error is as to an instruction given by the court to the jury in the form of their verdict. The instruction in question was as follows: "It has been the duty of the jury to find the facts of your verdict may be as the jury think the law requires. Guilty in manner and then be charged in the indictment. (There is no instruction in the number of counts on which the jury may find the defendant guilty)." The complaint of plaintiff is that it would have to be corrected by the jury because it is not true and correct. At all, they must find him guilty on more than one count and on more than one count. We do not think the jury could possibly have been misled in the direction claimed by counsel for plaintiff of error and their criticism of it seems to be hyperbolic and without merit. The verdict in this case appears to us to have been fully sustained by the facts, the trial was conducted without the intervention of material error.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1917


Clerk of the Appellate Court

OPINION

EE. 3

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton
(appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Edwardsville Coal Co.,
Appellant
vs.
No. 14.
October Term, 1918.
City Coal Co. of Edwardsville et al,
Appellees

213 I.A. 691

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

TRUSS

TRIAL JUDGE

October Term, 1918.

Edwardsville Coal Company,
Appellant.

v.

City Coal Company of Edwardsville
et al,

Appellees.

2131A. 991

Appeal from Madison.

Opinion by Higbee, P. J.

---oOo---

By a bill of complaint filed in the circuit court of Madison county on April 16, 1918, appellant made allegations showing it relied for the relief sought upon the following state of facts:

Appellant has been for some years the owner of a coal mining plant known as Mine No. 3, Edwardsville, Illinois, which on April 3, 1911 it leased to appellee, City Coal Company of Edwardsville. The latter company took possession of said mine held the same until about the time of the expiration of said lease, to wit, March 31, 1916, when the property was returned to appellant which has since been in possession of and operating the same. Upon the organization of the City Coal Company, appellant loaned the stock holders a considerable sum of money, the greater portion of which is still unpaid and appellant is now in possession of a majority of the stock of said company. R. W. Herzog was president of the City Coal Company during the entire period of the lease and Cy A. Geers was secretary-auditor of the same until 1914 and from that time Herzog was

October Term, 1918.

2131A-31

Appeal from Madison.

City Coal Company of Edwardsville

Opinion by Higbee, P. J.

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By a bill of complaint filed in the circuit court of Madison county on April 16, 1918, appellant made allegations showing it relied for the relief sought upon the state of facts:

Appellant has been for some years the owner of a coal mining plant known as Mine No. 3, Edwardsville, Illinois, which on April 2, 1911 it leased to appellee, City Coal Company of Edwardsville. The latter company took possession of said mine held the same until about the time of the expiration of said lease, to wit, January 1, 1914, when the property was returned to appellant under the same name. Upon the organization of the City Coal Company, appellant loaned the stock holders a considerable sum of money, the greater portion of which is still unpaid and appellant is now in possession of a majority of the stock of said company.

W. W. Herzog was president of the City Coal Company during the entire period of the lease and G. A. Carter was secretary-auditor of the same until 1914 and from that time Herzog was

the sole representative of the City Coal Company in its dealings with appellant. The City Coal Company failed to perform its obligations under the lease and from 1914, because of the insolvency of said company, appellant assumed active charge of the company and business. During the operation of the mine by the City Coal Company, appellant advanced various sums to pay the debts of said Company and on March 31, 1916, at the time of the expiration of the lease it was indebted to appellant for \$13993.82. The City Coal Company by reason of its insolvency gave notice of its intention to surrender the property and such surrender was made to appellant, which employed Herzog to act as its superintendent at said mine. After the surrender of the lease the mine was still carried on in the name of the City Coal Company although operated by appellant. Certain complications arose between appellant and Herzog which resulted in a notice to appellant signed by the City Coal Company by F. W. Herzog, president, Nettie Metzger, secretary, M. D. Geers and Cy A. Geers, directors, contending that the City Coal Company was still in possession of said mine No. 3. On receipt of the notice appellant discharged Herzog and directed him to turn over the possession of the property to its agent, which Herzog refused to do. The miners working in the mine upon learning of the claims of the City Coal Company, refused to work and since April 15, 1918 said mine has not been in operation. It was further alleged in said bill that if said mine continued to be idle, it will fall into bad repair and be permanently wasted and damaged; that appellees are irresponsible; that because of the state of war existing the maximum production of coal is necessary; that said Coal Company has not been

the sole representative of the City Coal Company in the dealings with appellant. The City Coal Company failed to perform its obligations under the lease and from 1914, because of the insolvency of said company, appellant assumed active charge of the company and business. During the operation of the mine by the City Coal Company, appellant advanced various sums to pay the debts of said company and on March 31, 1916, at the time of the expiration of the lease it was indebted to appellant for \$13,483.82. The City Coal Company by reason of its insolvency gave notice of its intention to surrender the property and such surrender was made to appellant, which employed Harzog to act as its representative at said mine. After the surrender of the lease the mine was still carried on in the name of the City Coal Company although operated by appellant. Certain relations arose between appellant and Harzog which resulted in a notice to appellant signed by the City Coal Company, by W. W. Harzog, president, Nettie Ketzner, secretary, W. I. Sears and J. A. Sears, directors, commanding that the City Coal Company was still in possession of said mine No. 3. On receipt of the notice appellant discharged Harzog and directed him to turn over the possession of the property to its agent, which Harzog refused to do. The miners working in the mine upon learning of the claims of the City Coal Company, refused to work and since April 15, 1918 said mine has not been in operation. It was further alleged in said bill that it said mine continued to be idle, it will fall into bad repair and be permanently wasted and damaged; that as a result the maximum production because of the state of war existing the maximum production of said mine is necessary; that said City Coal Company has not been

able to operate said mine and said mine, which was an output of five hundred tons of coal per day, will remain idle; that there are various outstanding accounts due for coal which belonged to appellant but which appellees are collecting; that unless appellees are restrained, appellant fears they will interfere with the possession and operation of the mine by appellant and its employees. There was a prayer in the bill for a temporary injunction, restraining appellees from collecting any money or accounts for coal produced at said mine and from interfering with the possession and operation of said property by appellant, from trespassing upon the property of appellant or interfering with its possession, maintenance and operation thereof or in any manner harassing, annoying, intimidating, threatening or assaulting employees of appellant and persons engaged in the operation of said mine; that such injunction be, upon final hearing, made permanent and that appellees may be required to account for and pay to appellant all money received for coal sold.

The prayer for the temporary injunction having been granted, a writ was issued dated April 26, 1910 by the clerk of said court, restraining appellees from interfering with appellant in its possession and operation of said mine and from harassing and intimidating employees of appellant as prayed for in the bill until the further order of the court. Later an answer was filed by appellees, admitting that appellant is the owner of said mine No. 3, the making of the lease referred to in the bill between appellant and said City Coal Company, but denying most of the other material allegations of the bill; stating that appellee, City Coal Company, continued in possession of said mine under

said lease until the temporary injunction was issued therein and setting up facts tending to show a defense. It is not shown when this answer was filed but it was sworn to by F.W. Herzog May 9, 1918. Later on May 20, 1918, appellees made a motion to dissolve the temporary injunction. Afterwards, on July 27, 1918, the court upon a hearing ordered that the temporary writ of injunction theretofore issued in the case, be dissolved; that appellees be let into the possession of said mine and all its equipment and property fully and without let or hindrance on the part of appellant or its agents, officers, etc. and that a writ of restitution issue against appellant on behalf of appellees to place them in possession thereof.

A motion was filed in this case by appellees, to dismiss the appeal herein for the following reasons: One, The order of the circuit court of Madison county dissolving the temporary writ of injunction herein, being the order appellant seeks to appeal from, does not dismiss appellant's bill. Two. The statute allowing appeals from interlocutory orders or decrees does not provide for an appeal from an order dissolving a temporary injunction. Three. An appeal does not lie from an order dissolving an injunction unless the injunction is the only relief sought or there has been a final order entered dismissing the bill. This motion was taken with the case and therefore comes before us now for determination.

The right of appeal is purely a statutory one, (Greve v. Goodson, 142 Ill.355) And while our statute provides for an appeal from an interlocutory order or decree of any court of this state overruling a motion to dissolve an injunction, it does not provide for an appeal in case the

This case is a temporary injunction was issued thereon and setting up facts tending to show a defense. It is not shown when his answer was filed but it was sworn to by T.W. May 9, 1918. Later on May 30, 1918, appellee made a motion to dissolve the temporary injunction. Afterward, on May 31, 1918, the court upon a hearing ordered that the temporary writ of injunction be dissolved and in the case, as stated, that appellee be let into the possession of his property and all his equipment and property fully and without let or hindrance on the part of appellant or his agents, officers, etc. and that a writ of restitution be granted against appellant on behalf of appellee to place them in possession of the same.

A motion was filed in this case by appellee, to dissolve the appeal herein for the following reason: That the order of the circuit court of Madison county dissolving the temporary writ of injunction herein, being the order of the court, does not dismiss appellant's appeal. Two. The statute allowing appeals from inferior courts or decrees does not provide for an appeal from an order dissolving a temporary injunction. James, Jr. vs. The State, 111 Ill. 235. And while our statute provides for an appeal from an interlocutory order or decree of any court of this state overruling a motion to dissolve an injunction, it does not provide for an appeal in case the motion was taken with the case and therefore cannot delay us now for determination.

The right of appeal is purely a statutory one, (James v. Goodson, 142 Ill. 325) and while our statute provides for an appeal from an interlocutory order or decree of any court of this state overruling a motion to dissolve an injunction, it does not provide for an appeal in case the

motion to dissolve such injunction is sustained. Rev. Stat. (Hurd) Chap. 110, sec.123. It is plain therefore that the order in this case so far as it sustains the motion to dissolve the temporary injunction, is not such an order as an appeal will lie from. The bill in this case not only sought for an injunction but also prayed that appellees be required to account for and pay to complainant all money received for coal sold by them and for such other and further relief in the premises as equity might require and to the court should seem meet. The accounting asked for was not disposed of by the court in the decree appealed from nor was the bill dismissed. In the case of Northwestern Brewing Co. v. Manion, 67 Ill.App.316, where an appeal from an order dissolving an injunction was under consideration, it was held that as no final decree disposing of the bill had been made, the suit was still pending in the circuit court and it was further said that "from an order dissolving an injunction, no appeal lies unless an injunction be the only relief sought by the bill." Citing Cors v. Tompkins, 46 Ill.App.322; Clabby v. Sheldon, 47 Ill.App.166; Brown v. Am.Stone Press Brick Mfg.Co.54 Ill.App.647. Under the rule above laid down it is plain that no appeal would lie from the order sought to be appealed from in this court. It is true that in addition to dissolving the temporary injunction the court ordered a writ of restitution against appellant to place appellees in possession of the mine described in the bill of complaint. This portion of the order was no doubt prompted by a finding of the court as shown by a supplemental order or statement contained in the bill of exceptions, that such possession of the mine as appellant had at the time the bill

... to dissolve such judgment is sustained. Rev.
... (Hurd) Chap. 110, sec. 128. It is held therefore
... the order in this case so far as it sustains the
... dissolve the temporary injunction, is not such
... as an appeal will lie from. The bill in this
... only sought for an injunction but also prayed
... be required to account for and pay to
... all money received for coal sold by them and for
... and further relief in the premises as equity
... and to the court should seem meet. The ap-
... asked for was not disposed of by the court in the
... from nor was the bill dismissed. In the
... of Northwestern Brewing Co. v. Hamilton, 97 Ill. App. 216,
... from an order dissolving an injunction was
... consideration, it was held that as no final decree
... of the bill had been made, the bill was not
... in the circuit court and it was further said that
... an order dissolving an injunction, no appeal lies
... an injunction be the only relief sought by the bill."
... v. Thompson, 10 Ill. App. 216; Clapp v. Sheldon,
... 188; known as the Stone Press Patent No. 60,84
... 647. Under the rule above laid down it is plain
... no appeal would lie from the order sought to be appealed
... in this court. It is true that in addition to dis-
... the temporary injunction the court ordered a writ
... against appellant to place sameless in
... of the mine described in the bill of complaint.
... of the order was so doubt created by a final
... of the court as shown by a supplemental order or state-
... contained in the bill of exceptions, in a such por-
... of the mine as appellant had at the time the bill

was filed, was shown by the proofs to have been improperly obtained and therefore a court of equity would not aid it in maintaining such possession. This part of the order was not asked for in the motion to dissolve the temporary injunction and might properly have been omitted but the object of the chancellor was evidently to enforce the rule which would prevent appellant from obtaining any advantage of his temporary injunction and to undo whatever had been wrongfully done by means of it. *Harrington v. Harrington*, 11 Ill.App.121. Though the temporary injunction issued in this proceeding has been dissolved, yet all the matters concerning which relief was sought, have not been disposed of and no final decree has been entered dismissing the bill.

We conclude upon a careful consideration of the record that the order appealed from was an interlocutory order, which could not properly be appealed from and therefore the motion to dismiss the appeal will be sustained. But such holding ~~if~~ shall not in any way affect the right of the chancellor in the court below to enter such final order or decree as justice and the equities of the case may, under the proofs warrant.

Appeal dismissed.

Not to be reported in full.

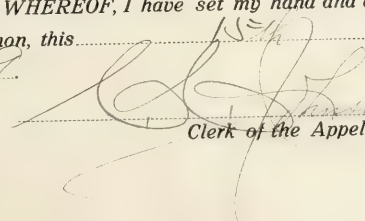
was filed, was shown by the record to have been properly
obtained and therefore a court of equity would not aid it in
preventing such possession. This part of the order was not
subject to the motion to dissolve the temporary injunction.
The two might properly have been omitted but the object of
the motion was evidently to enforce the rule which
would prevent appellant from obtaining any advantage of
the temporary injunction and it was whatever the law
is. The motion to dissolve the temporary injunction issued in
this proceeding has been dissolved, yet all the matters
concerning which relief was sought, have not been disposed
of and in final decree has been entered dismissing the bill.
We conclude upon a careful consideration of the
facts that the order appealed from was an interlocutory
order, which could not properly be appealed from and there-
fore the motion to dismiss the appeal will be granted. But
and nothing at all not in any way affect the right of
the chancellor in the court below to enter such final order
or decree as justice and the equities of the case may, under
the facts warrant.

Appeal dismissed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of May A. D. 1919.


Clerk of the Appellate Court

OPINION

E.E.S.



4160

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit: On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Walter Pottigrew a
Minor by next friend
Appellee

213 I.A. 691

~~ERROR TO~~
APPEAL FROM

No. 17
October Term, 1918.

vs.

Tom Jennings et al
Appellants

City COURT

Carl St Louis COUNTY

TRIAL JUDGE

HON. H. L. Browning

October Term, 1918.

Walter Pettigrew, a minor,
by next friend,

Appellee

v.

Tom Jennings et al,

Appellants

213 I.A. 691

Appeal from City Court

East St. Louis.

Opinion by Higbee, P. J.

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At the time of the occurrence with which this suit is concerned, appellee was between ten and eleven years of age and resided with his mother on the west side of Collinsville avenue in East St. Louis, Illinois, near where it is intersected by Sixth street and Pennsylvania avenue. Sixth street runs north and south, Collinsville avenue runs northeast and southwest and Pennsylvania avenue runs east and west. At the point of intersection of Collinsville and Pennsylvania avenues, Sixth street runs into Collinsville avenue and thence loses its identity. Summit avenue runs east and west, is the first street south of Pennsylvania avenue and intersects Sixth street and Collinsville avenue.

On June 13, 1917 appellee was attending the Horace Mann School located near Summit avenue several blocks east of Sixth street. At the close of school that day appellee started home and with two companions of about the same age got on the rear end of a grain and feed wagon for the purpose of riding thereon. At the time appellee was injured the wagon was traveling north on Sixth street between Summit

Witnesses, 1917

2131A. 691

Appeal from City Court

East St. Louis

Alfred Pettigrew, a minor,
by next friend,

Appellee

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The Commonwealth of Illinois

Appellant

CHAS. F. SMITH, J.

At the time of the occurrence with which this suit is connected, appellee was between ten and eleven years of age and resided with his mother on the west side of Collinsville avenue in East St. Louis, Illinois, near where it is intersected by sixth street and Pennsylvania avenue. Sixth street runs north and south, Collinsville avenue runs north and east and southwest and Pennsylvania avenue runs east and west. At the point of intersection of Collinsville and Pennsylvania avenues, sixth street runs into Collinsville avenue and thence loses itself. Collinsville runs east and west, to the first street south of Pennsylvania avenue and intersects sixth street and Collinsville avenue. On June 12, 1917 appellee was attending the morning Mann School located near Summit avenue several blocks east of sixth street. At the close of school that day appellee started home and with two companions of about the same age got on the rear end of a team and load wagon for the purpose of riding thereon. At the time appellee was injured the wagon was traveling north on sixth street between Summit

and Pennsylvania avenues. The wagon was loaded with sacks of grain or feed and appellee could not see ahead, neither could any one about to meet the wagon see appellee. Appellant's automobile, a small service car, driven by one of their employes, was also on Sixth street, between Summit and Pennsylvania avenues, going south. The two vehicles met on Sixth street about midway between Summit and Pennsylvania avenues. The wagon was almost in the center of the street when the automobile passed it. As the vehicles passed the automobile was running near the west curb, which was at its right, and as the wagon was near the center of the street the automobile passed very near to the wagon. Just before the vehicles met, appellee's companions jumped off of the rear end of the wagon and crossed to the west side of Sixth street. They were followed by appellee who jumped off of the rear end of the wagon and in attempting to cross to the west side of Sixth street was struck by appellants' automobile, receiving the injuries of which he complains. There is a dispute as to the speed of the automobile at the time of the injury, some witnesses estimating the speed as low as six miles and others as high as fifteen miles an hour. There is also a dispute as to whether the injury happened in a business or a residence portion of the city.

The original declaration consisted of one count and charged appellants with common law negligence in the operation of the automobile. Four additional counts were filed. The first additional count alleged that the automobile was being operated in excess of ten miles an hour contrary to a certain ordinance of East St. Louis, but that

and Pennsylvania avenues. The wagon was loaded with cash.
of grain or feed and apples could not see ahead, neither
could any one about to meet the wagon see apples. Apple-
ton's automobile, a small motor car, driven by one of
their employees, was also on Fifth street, between
and Pennsylvania avenues, at the time. The two vehicles
were on Fifth street about midway between Grant and Penn-
sylvania avenues. The wagon was almost in the center of the
street when the automobile passed it. As the vehicles
passed the automobile was turning west the west curb, which
was at its right, and as the wagon was near the center of
the street the automobile passed very near to the wagon.
Just before the vehicles met, Appleton's automobile turned
out of the east end of the wagon and crossed to the west
side of Fifth street. They were followed by Appleton who
jumped off of the rear end of the wagon and in attempting
to cross to the west side of Fifth street was struck by
Appleton's automobile, receiving the injuries of which he
complains. There is dispute as to the speed of the auto-
mobile at the time of the injury, some witnesses estimating
the speed at low as six miles and others as high as fifteen
miles an hour. There is also dispute as to whether the
injury happened in a business or a residential section of
the city.
The original declaration submitted by the plaintiff
and charged Appleton with common law negligence in the
operation of the automobile. Four additional counts were
filed. The first additional count alleged that the auto-
mobile was being operated in excess of ten miles an hour con-
trary to a certain ordinance of West St. Louis, but that

count was withdrawn before the case was submitted to the jury. The second additional count charged appellants with causing the automobile to be wilfully and carelessly driven against appellee. The two remaining counts are based on section ten of the Motor Vehicle Law, one charging speed through the business portion of the city at exceeding ten miles an hour and the other charging speed through the residence portion of the city at exceeding fifteen miles an hour. Appellant pleaded the general issue. The case was tried with a jury, and at the close of appellee's evidence and again at the close of all the evidence appellants offered a peremptory instruction in their favor the same being in each instance refused. The jury awarded appellee \$350 damages on which verdict judgment was rendered and a new trial having been denied the record was brought to this court.

Appellee was familiar with that portion of the city where the injury occurred as he traversed it in going to and from school and it was near his home. He must have known that vehicles used that street generally, that the wagon on which he was riding might meet other vehicles and that they would pass on the right side of that wagon. He was riding on the rear end of the wagon which was near the center of the street and the middle of the block. He could not see vehicles approaching and their occupants could not see him. Notwithstanding those facts he jumped off of the rear end of the wagon and without looking to see if another vehicle was approaching attempted to cross the street and was struck by appellants' automobile. Appellee was plainly guilty of negligence causing or contributing to his injuries and we find no evidence which will excuse that negligence, if negligence can be imputed to a boy of his age. It follows that it is

... was ... before the case was admitted to the ... jury. The second additional count charged appellants with ... the automobile to be wilfully and carelessly driven against appellee. The two remaining counts are based on ... section ten of the Motor Vehicle Law, one charging speed ... the business portion of the city at exceeding ten miles an hour and the other charging speed through the residential portion of the city at exceeding fifteen miles an hour. Appellant pleaded the General Issue. The case was tried ... jury, and at the close of appellee's evidence and ... of the close of all the evidence appellants offered a rebuttal instruction in their favor the same being in ... The jury awarded appellee \$500 damages on which verdict judgment was rendered and a new trial having been denied the record was brought to this court. Appellee was familiar with that portion of the city where the injury occurred as he traversed it in going to and from school and it was near his home. He must have known that vehicles used that street generally, that the wagon on which he was riding might meet other vehicles and that they would pass on the right side of that wagon. He was riding on the rear end of the wagon which was near the center of the street and the middle of the block. He could not see vehicles approaching and their occupants could not see him. Notwithstanding those facts he jumped off of the rear end of the wagon and without looking to see if another vehicle was approaching attempted to cross the street and was struck by appellee's automobile. Appellee was plainly guilty of negligence causing or contributing to his injuries and no evidence which will excuse that negligence, if negligence can be imputed to a boy of his age. It follows that it is

only necessary for us to determine the question whether appellee, a boy ten or eleven years of age, could be found guilty of negligence. In the case of Koehler v. Chicago City Ry. Co., 166 Ill.App.571, which was a suit for personal injuries occasioned to a minor ten years of age who was struck by a street car on account of his failure to watch out for an approaching car while he crossed the street passing behind a car going in an opposite direction, it was held that he was guilty of contributory negligence and a judgment in his favor was reversed with a finding of facts. It was said in the course of the opinion in that case, "The evidence shows that the plaintiff at the time of the accident was ten years old. A boy ten years old may be guilty of such contributory negligence as to bar his recovery for injuries caused by the negligence of another". (Citing Chicago Union Trac.Co.v. McInnis, 112 Ill. App.177; Wilson v. Chicago City Ry. Co., 133 Ill.App.433.) Under the uncontradicted proof and the authorities above cited, appellee was clearly guilty of contributory negligence and cannot be permitted to recover in this case.

When the undisputed evidence shows that plaintiff is guilty of contributory negligence, the question becomes a question of law and it is the duty of the trial court to direct a verdict for defendant. North Chicago St.Ry.Co. v. Cossar, 293 Ill.608; Koehler v. Chicago City Ry. Co., supra. The trial court should have sustained the motion of appellants for a peremptory instruction in their favor, and because of this error, and as under the undisputed proofs appellee

only necessary for us to determine the question whether
 appellee's position or character years of age, could be found
 guilty of negligence. In the case of *Kocher v. Chicago City*
Re. Co., 100 Ill. App. 571, which was a suit for personal in-
 jury occasioned to a minor ten years of age who was struck
 by a street car while he was crossing the street passing behind
 a car which was stopped at a red light, it was held that he was
 guilty of contributory negligence and a judgment in his favor
 was reversed. (A finding of facts. It was said in the
 opinion in that case, "The evidence shows that
 the plaintiff at the time of the accident was ten years old.
 A boy ten years old may be guilty of such contributory neg-
 ligence as to bar his recovery for injuries caused by the
 negligence of another." (Citing *Chicago Union Traction Co. v.*
McGinnis, 112 Ill. App. 177; *Wilson v. Chicago City Re. Co., 100*
Ill. App. 435.) Under the uncontroverted proof and the
 authorities now cited, appellee was clearly guilty of con-
 tributory negligence and cannot be permitted to recover in
 this case. When the undisputed evidence shows that plaintiff
 is guilty of contributory negligence, the question becomes a
 question of law and it is the duty of the trial court to
 direct a verdict for defendant. *North Chicago Lumber Co. v.*
Cosway, 202 Ill. App. 408; *Kocher v. Chicago City Re. Co., 100*
 The trial court should have sustained the motion of appel-
 lants for a peremptory instruction in their favor, and because
 of this error, and as under the undisputed facts appellee

cannot recover a judgment in his favor, the cause will not be remanded.

Reversed with finding of fact.

Finding of fact to be incorporated in the judgment.

We find as an ultimate fact in this case that at the time he was injured appellee, Walter Pettigrew was not in the exercise of due care for his own safety.

Not to be reported in full.

cannot recover a judgment in his favor, the court will not
grant him an order of attachment.

It is the duty of the court to see that the law is
reversed with binding effect.

The court has the duty of seeing that the law is
binding on all who are subject to its jurisdiction.

It is the duty of the court to see that the law is
binding on all who are subject to its jurisdiction.

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binding on all who are subject to its jurisdiction.

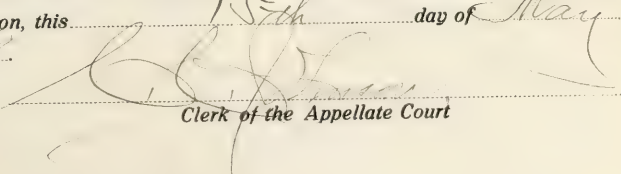
The court has the duty of seeing that the law is
binding on all who are subject to its jurisdiction.

It is the duty of the court to see that the law is
binding on all who are subject to its jurisdiction.

The court has the duty of seeing that the law is
binding on all who are subject to its jurisdiction.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1912.


Clerk of the Appellate Court

OPINION

FEES

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4172

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton
(appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

213 I.A. 691

Nellie Newton et al,
Appellees

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 27
October Term, 1918.

Williamson COUNTY

Bert Nigro et al,
Appellants

TRIAL JUDGE

HON. BENJAMIN W. POPE

October Term, 1918.

Rellie Newton et al,

Appellees

v.

Hert Negro et al,

Appellants

213 I.A. 291

Appeal from Williamson.

Opinion by Higbee F. J.

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This was a suit under section 9 of the Dram Shop Act of this state, brought by appellees against certain dram shop keepers of Johnston City, Illinois to recover damages for the loss of support to appellees, occasioned by the sale and gift of intoxicating liquors made by the defendants below to Ray Newton, the husband of appellee Rellie Newton and the father of the other appellees.

A suitable declaration was filed to which there was a plea of not guilty. Before the trial the suit was dismissed by plaintiffs as to one of the defendants and at the conclusion of plaintiffs' testimony, plaintiffs also dismissed the suit as to eight of the other defendants. The trial resulted in a verdict and judgment for appellee in the sum of \$1500. from which the defendants appealed to this court. A number of reasons are forwarded by appellants why the judgment in this case should be reversed, but every question raised which appears to us to be of importance, can only be legally raised through the filing of a bill of exceptions and in this case appellees challenge the authentication of

October Term, 1918.

2131 A. 201

Appeal from Williamson.

Willie Newton et al,
Appellees

v.

Art Hixson et al,
Appellants

Opinion by Hughes, P. J.

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There was a suit under section 1 of the Green Shop
Act of this state, brought by appellees against certain
green shop keepers of Johnston City, Illinois to recover
damages for the loss of support to appellees, occasioned by
the sale and gift of intoxicating liquors made by the de-
fendants below to Ray Newton, the husband of appellee Willie
Newton and the father of the other appellees.
A suitable declaration was filed to which there was
a plea of not guilty. Before the trial the suit was dismissed
by plaintiffs as to one of the defendants and at the con-
clusion of plaintiffs' testimony, plaintiffs also dismissed
the suit as to eight of the other defendants. The trial
resulted in a verdict and judgment for appellees in the sum
of \$1500. from which the defendants appealed to this court.
A number of reasons are forwarded by appellants why the
judgment in this case should be reversed, but every question
raised which appears to us to be of importance, can only
be legally raised through the filing of a bill of exception
and in this case appellees challenge the admission of

the purported bill of exceptions filed in the case and insist that there is no lawful bill of exceptions which can be considered by the court. The certificate of the trial judge to the purported bill of exceptions is as follows: "This bill of exceptions was duly presented to me by the defendants this fourth day of July, 1918 and approved. Benj. W. Pope, trial judge." This authentication of certificate does not purport to state that the bill of exceptions contained all the evidence introduced upon the trial of the cause and is otherwise wholly insufficient to constitute a proper authentication or certificate. It only purports to be an approval of the bill presented and does not in any way profess to certify to the correctness or completeness of the same. In the case of *Young v. City of Peirfield*, 173 Ill.App.311, this court sustained the doctrine that where there is no certificate of the trial judge that the bill of exceptions contains all the evidence introduced upon the trial of a cause, such a certificate is not such a bill of exceptions as the law requires and the presumptions are all in favor of the verdict and judgment and also held that in the absence of a certificate of the judge showing that the bill of exceptions contains all such evidence, the appellate court will not examine to see if that which appears in the record does sustain the verdict. We there further stated "the law is well settled that where such a certificate from the judge is not incorporated in the bill of exceptions, that the appellate court must presume that the jury and the court were warranted in finding the verdict and judgment rendered, and we cannot interfere with such verdict on an appeal". In pursuance of the doctrine laid down in the above case which is in accordance with the authorities in this state, we must

the proposed bill of exceptions filed in the case and the
list that there is no benefit bill of exceptions which can
be considered by the court. The certificate of the trial
judge to the proposed bill of exceptions is as follows:
"This bill of exceptions was duly presented to me by the
attorney for the defendant on the tenth day of July, 1918 and approved. Being
a proper, trial judge. This authentication of certificate
does not purport to state that the bill of exceptions con-
tains all the evidence introduced upon the trial of the
case and is otherwise wholly insufficient to constitute a
proper authentication or certificate. It only purports to
be an approval of the bill presented and does not in any
way purport to certify to the correctness or completeness of
the same. In the case of Young v. City of Kentucky 1915
this court has held that the bill of exceptions must contain
there is no certificate of the trial judge that the bill of
exceptions contains all the evidence introduced upon the
trial of a case, such a certificate is not such a bill of
exceptions as the law requires and the present case was all
in favor of the verdict and judgment and also held that in
all cases where a bill of exceptions is presented to the
court will not examine to see if that which appears in the
record does contain the verdict. We there further stated
"the law is well settled that where such a certificate from
the judge is not introduced in the bill of exceptions, that
the appellate court must presume that the jury and the court
were warranted in finding the verdict and judgment rendered,
and we cannot interfere with such verdict in an appeal." In
pursuance of the doctrine also set out in the above case which
is in accordance with the authorities in this state, we must

presume that the verdict in this case was fully warranted by the facts.

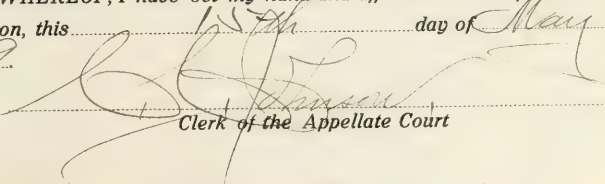
Appellants complain of the giving of certain instructions which authorized exemplary damages, but we cannot consider the criticisms offered for the reason that the question whether such instructions were legally correct or not, depends to a large extent upon the proof in the case and that, as we have above said, is not before us for review. Complaint is further made by appellants of the refusal by the court of one of the instructions offered by them. This instruction endeavored to cover the question of "treats" or "set-ups" of intoxicating liquors to the said Roy Newton by persons other than appellants and instructed a verdict for appellants under certain conditions of the evidence named. This instruction was inaccurate in that it excused appellant from all liability for "treats" or "set-ups" made by their clerks or agents and in other respects was so dependent upon the evidence that it could not be construed satisfactorily unless we had all the facts before us. From a consideration of such portions of the record as is properly before us and for the reasons above given the judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1919


Clerk of the Appellate Court

OPINION

EE. S

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4182

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

.....

.....

Dorothy Crawshaw,

.....

Appellee

.....

.....

.....

.....

vs.

No. 47

October Term, 1918.

.....

.....

St. Louis Electric Terminal Ry. Co.,

.....

Appellant

.....

.....

213 I.A. 692

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

of the Appellate Court

COURT, organized held at St. Vernon Illinois, on the Fourth Tuesday
of our Lord, one thousand nine hundred and thirteen the
the year of our Lord one thousand nine hundred and thirteen

Hon. J. C. Langston

Appellate Court April 1st 1913

GRANT HOLCOMB Sheriff

Before a to-wit: On the twelfth day of April A. D. 1913, there was filed in this
Court and at St. Vernon Illinois, an OPINION in this matter and I have taken notice of

MEMORANDUM
APPELLATE COURT

COUNTY

TRIAL JUDGE

October Term, 1918.

Dorothy Crawshaw,

Appellee

v.

St. Louis Electric Terminal
Railway Company,

Appellant.

213 I.A. 692

Appeal from Madison.

Opinion by Higbee, J. J.

---oCo---

Dorothy Crawshaw, appellee, commenced this suit against St. Louis Electric Terminal Railway Company, appellant, for the purpose of recovering damages for personal injuries sustained by her in a collision between an automobile in which she was riding and a street car of appellant in Granite City, Illinois.

At the time of the collision which occurred at the intersection of Twenty-third and C street in said city, appellee was occupying a front seat of the automobile with her husband, the owner of the same, and three other persons were occupying the back seat. The husband John J. Crawshaw brought suit to recover damages for injuries to himself and his automobile alleged to have been caused by the same collision. He recovered a judgment in the court below from which an appeal was taken to this court and in that suit an opinion was filed by this court at the October term, 1918. The declaration contained substantially the same charges of negligence against appellant as that in the case of said John J. Crawshaw. The first count charged the negligent and

October Term, 1918.

Term No. 47.

2131A.002

Appeal from decision.

Appellee

St. Louis Electric Terminal
Railway Company,

Appellant.

Opinion by Hilde, J. 7.

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Dorothy Crawshaw, appellee, commenced this suit against St. Louis Electric Terminal Railway Company, appellant, for the purpose of recovering damages for personal injuries sustained by her in a collision between an automobile in which she was riding and a street car of appellant in Granite City, Illinois.

At the time of the collision which occurred at the intersection of Twenty-third and C street in said city, appellee was occupying a front seat of the automobile with her husband, the owner of the same, and three other persons occupying the back seat. The husband John T. Crawshaw brought suit to recover damages for injuries to himself and to automobile alleged to have been caused by the same collision. He recovered a judgment in the court below from which an appeal was taken to this court and in that suit an opinion was filed by this court at the October term, 1918. The decision contained substantially the same charges of negligence against appellant as that in the case of said John T. Crawshaw. The first count charged the negligent and

careless operation of the street car upon Twenty third street and across C street; the second that the car was operated at a high and dangerous rate of speed without sounding any gong or other warning; and the third, that said car was negligently and carelessly operated across C street at a high and dangerous rate of speed without sounding any gong and without having a headlight burning on said car. Each count charged that by reason thereof and while plaintiff with due care and caution for her own safety, was riding in the automobile along C street, the car struck the same and she received the injuries for which she brought this suit. The general issue was filed and the jury upon the trial, returned a verdict giving plaintiff damages in the amount of \$860, for which amount the judgment was entered, from which this appeal is taken.

The testimony as to how the accident occurred is substantially the same and is given by the same witnesses as that given upon the trial of the John J. Crawshaw case. The facts in this case are fully set forth in the opinion above referred to in that case so it is unnecessary to restate them here, and we see no good reason to depart from the conclusion we reached in such case that the facts were sufficient to sustain the verdict. It is true that the jury in this case answered the third special interrogatory submitted by appellant upon the question whether the injury to plaintiff occurred by reason of the street car being operated without sounding a gong or giving other reasonable warning of its approach to C street, "no," while in the former case this interrogatory was answered, "yes." But the findings on the other special interrogatories upon other facts submitted, were in harmony with the general verdict and those findings being

...the car was operated at
a high and dangerous rate of speed without sounding any horn
or warning, and the fact that said car was negligently
operated across the street at a high and dangerous
rate of speed without sounding any horn and without having
a readily operating horn car. Each count charged that
the reason therefor and while plaintiff with due care and
attention for her own safety, was riding in the automobile
across the street, the car struck the same and she received the
injuries for which the plaintiff seeks relief. The general issue
was tried and the jury upon the trial, returned a verdict
that plaintiff damaged in the amount of \$250, for which
judgment was entered, from which this appeal is
taken. The record in this case is as follows:
The testimony in support of the accident occurred is
substantially the same and is given by the same witnesses as
that given upon the trial of the John L. Greenow case. The
facts in this case the jury set forth in the opinion above
referred to in that case so it is unnecessary to restate
them here, and we see no good reason to depart from the con-
clusion we reached in such case that the facts were sufficient
to sustain the verdict. It is true that the jury in this
case answered the third special interrogatory submitted by
appellant, but the question whether the injury to plaintiff
occurred by reason of the street car being operated without
sounding a horn or giving other reasonable warning of its
presence to the street, "no," while in the former case this
interrogatory was answered, "yes," but the findings on the
other special interrogatories upon other facts submitted, were
in many with the general verdict and those findings being

proper, the general verdict in favor of appellee naturally followed.

Upon the trial the court refused to admit in evidence a plat of the intersection of the streets in question and certain photographs of the premises and of this appellant complains. While the plat might properly have been admitted in evidence there was no error in excluding it for as said by this court in the former case above referred to upon this subject, "the surroundings of the intersection of this street with the railroad were simple and we do not think the jury could have been very materially benefitted by any plat that could have been introduced in evidence." Neither did the court err in refusing to allow the photographs offered by appellant to go to the jury for the reason that while this injury occurred in June when the trees in question were in full foliage, the photographs were taken the latter part of October when the trees were practically bare and the evidence does not show that the photographs correctly set forth the conditions as they existed at the time of the accident. The objection to the testimony of Dr. Schwartz concerning the test made by him on a paved street, to ascertain in what distance he could stop his automobile while it was running at a rate not to exceed ten miles an hour, was properly sustained by the court for the reasons also given in our former opinion above referred to.

Complaint is also made by appellant because this case was set for trial ahead of the John J. Crawshaw case, although the latter case stood ahead of this upon the general docket. No reason is alleged why appellant was injured by the setting of this case for trial ahead of the other case, nor does it appear to us to have occurred, so we must assume

proper, the General verdict in favor of appellee naturally followed. Upon the trial the court refused to admit in evidence a plan of the intersection of the streets in question and certain photographs of the premises and of the surrounding area. While the plan might properly have been admitted in evidence there was no error in excluding it for as said by this court in the former case above referred to upon this subject, "the surroundings of the intersection of this street and the railroad were such and we do not think the jury could have been very materially benefited by any plan that might have been introduced in evidence." Neither did the court err in refusing to allow the photographs offered by appellee to go to the jury for the reason that while this case occurred in June when the trees in question were in full foliage, the photographs were taken the latter part of May when the trees were practically bare and the evidence does not show that the photographs correctly set forth the conditions as they existed at the time of the accident. The objection to the testimony of Dr. Schwartz concerning the statement made by him on a paved street, to ascertain in what direction he could stop his automobile while it was running at a rate not to exceed ten miles an hour, was properly sustained by the court for the reasons also given in our former opinion above set out.

Complaint is also made by appellee because this case was set for trial ahead of the John L. Grawshaw case, although the latter case stood ahead of this upon the general docket. No reason is alleged why appellee should be injured by the setting of this case for trial ahead of the other cases, nor does it appear to us to have occurred, so we must assume

that the trial judge made the setting of the cases which he did make for some good and sufficient cause which it was for him to determine in the exercise of sound, legal discretion and as that discretion does not appear to us to have been abused, such action of the court cannot be reviewed.

Spitzer v. Schlatt, 249 Ill.416.

Appellant complains of certain instructions given for appellee. The first of these instructions told the jury that if the driver of the automobile was guilty of negligence which contributed towards or helped to cause the collision yet if they further believed from the evidence that the appellee was not by her own conduct, in any way the cause of such negligence if any on the part of the driver, then the negligence of the driver could not be charged against or imputed to appellee. This instruction is practically identical with one sustained in Chicago City Ry. Co. v. Norn 133 Ill.App.365. The complaint of the second instruction given for appellee is that it told the jury appellee might recover if the defendant was guilty of any negligence charged in the declaration or some count thereof, and it therefore authorized them to base their verdict upon the allegation of negligence on the part of appellant in failing to have a headlight burning on the car at the time of the collision. It is true the evidence showed that the accident happened before sundown and that the failure of the car to carry a headlight, could not have contributed to the collision, but the court of its own motion gave an instruction to the jury to disregard all averments in the declaration as to the headlight on the car which came in contact with the automobile in which appellee was riding. The jury therefore could not have been misled by

that the trial judge made the setting of the case which he
did make for some good and sufficient cause which it was for
him to determine in the exercise of sound legal discretion
and that discretion does not appear to us to have been
misused, and action of the court cannot be reviewed.
Appellant complains of certain instructions given
to the jury. The first of these instructions told the jury
that if the driver of the automobile was guilty of negligence
which contributed towards or helped to cause the
accident they further believed from the evidence that the
negligence was not in her own conduct, in any way the cause of
such negligence is any on the part of the driver, then the
negligence of the driver could not be charged against or
imputed to a police. This instruction is practically identical
and with one sustained in Chicago City Ry. Co. v. Horn 125
Ill. App. 366. The complaint of the second instruction given
for negligence is that it told the jury negligence might recover
if the defendant was guilty of any negligence charged in the
declaration or some count thereof, and is therefore authorized
to base their verdict upon the allegation of negligence
on the part of appellant in failing to have a headlight
burning on the car at the time of the collision. It is true
the evidence showed that the accident happened before sundown
and that the failure of the car to carry a headlight could
not have contributed to the collision, but the court of its
own motion gave an instruction to the jury to disregard all
evidence in the declaration as to the headlight on the car
which came in contact with the automobile in which appellee
was riding. The jury therefore could not have been misled by

the instruction complained of and there was no reversible error in giving it. Appellee's third instruction told the jury that in determining the amount of damages plaintiff was entitled to recover if any, they should consider such future suffering and loss of health if any, as the jury might believe from the evidence, before then she had sustained or would sustain by reason of such injuries. This instruction was identical with that approved in Cicero and Proviso St.Ry.Co., v. Brown, 193 Ill.274 and states the law correctly, but it is said not to be proper here for the reason that there was no evidence upon which to base any instruction as to permanent injury or future suffering and loss of health. While the evidence upon this subject was not of much moment, yet there was sufficient to base this part of the instruction upon so that the same could be properly considered with other elements of damages therein mentioned. Five instructions offered by appellant were refused by the court and of this appellant also complaining. Two of these instructions stated abstract propositions of law and therefore regardless of the question whether such propositions were stated correctly, it was not reversible ~~error~~ error to refuse them. The three other instructions refused for appellant so far as they stated correct principles of law applicable to the facts in the case are covered by instructions given by the court. While complaint is made of the amount of the judgment, we do not think under all the circumstances that the judgment for \$850 was so excessive as to warrant a reversal on that account.

The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

...the trial judge made the setting of the cases which he
did make for some good and sufficient cause which it was for
him to determine in the exercise of sound legal discretion
and as that discretion does not appear to me to have been
exercised, such action of the court was not reversible.
Hester v. Schlatt, 190 Ill. 418.
...plaint complaints of certain instructions given
the jury. The first of these instructions told the jury
that if the driver of the automobile was guilty of negligence
which contributed towards or helped to cause the collision
that if they further believed from the evidence that the
negligence was not by her own conduct, in any way the cause of
the collision, then the negligence of the driver could not be charged against or
imputed to the appellee. This instruction is practically identical
with one sustained in Chicago City Ry. Co. v. Egan 183
Ill. App. 388. The complaint of the second instruction given
for appellee is that it told the jury appellee might recover
if the defendant was guilty of any negligence charged in the
complaint or some count thereof, and it therefore authorized
them to base their verdict upon the allegation of negligence
on the part of appellant in failing to have a headlight
burning on the car at the time of the collision. It is true
the evidence showed that the accident happened before sundown
and that the failure of the car to carry a headlight, could
not have contributed to the collision, but the court of its
own motion gave an instruction to the jury to disregard all
statements in the declaration as to the headlight on the car
which came in contact with the automobile in which appellee
was riding. The jury therefore could not have been misled by

The instruction complained of and there was no reversible error in giving it. Appellee's third instruction told the jury that in determining the amount of damages plaintiff was entitled to recover if any, they should consider such future suffering and loss of health if any, as the jury might believe from the evidence, before then she had sustained or would sustain by reason of such injuries. This instruction was identical with that approved in *Cicero and Proviso St.Ry.Co., v. Brown*, 193 Ill.274 and states the law correctly, but it is said not to be proper here for the reason that there was no evidence upon which to base any instruction as to permanent injury or future suffering and loss of health. While the evidence upon this subject was not of much moment, yet there was sufficient to base this part of the instruction upon so that the same could be properly considered with other elements of damages therein mentioned. Five instructions offered by appellant were refused by the court and of this appellant also complains. Two of these instructions stated abstract propositions of law and therefore regardless of the question whether such propositions were stated correctly, it was not reversible ~~error~~ error to refuse them. The three other instructions refused for appellant so far as they stated correct principles of law applicable to the facts in the case are covered by instructions given by the court. While complaint is made of the amount of the judgment, we do not think under all the circumstances that the judgment for \$850 was so excessive as to warrant a reversal on that account.

The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

the instruction complained of and there was no reversible error in giving it. Appellant's third instruction told the jury that in determining the amount of damages plaintiff was entitled to recover if any, they should consider such amount suffering loss of health if any, as the jury might believe from the evidence before them and had sustained or would sustain by reason of such injuries. This instruction was identical with the one approved in *Cicero and Novato St. Ry. Co. v. Brown*, 193 Ill. 294 and states the law correctly, but it is said not to be proper here for the reason that there is no evidence upon which to base any instruction as to permanent injury or future suffering and loss of health. While the evidence upon this subject was not of much moment, yet it was sufficient to base this part of the instruction upon it. The same could be as properly considered with other instructions of damages therein mentioned. Five instructions offered by appellant were refused by the court and of this refusal also complains. Two of these instructions stated the correct principles of law and therefore reversible error of the question whether such propositions were stated correctly, it is not reversible error to refuse them. The three other instructions complained of were also refused by the court and the correct principles of law applicable to the facts in the case are covered by instructions given by the court. While complaint is made of the amount of the judgment to do not think under all the circumstances that the judgment for \$2500 was so excessive as to warrant a reversal on that account. The judgment of the court below will be affirmed.

Reversed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th *day of* May *A. D. 191* 9

Charles C. Johnson
Clerk of the Appellate Court

OPINION

E. S.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit: On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

213 I.A. 692

**ERROR TO
APPEAL FROM**

William C. Beiser,

Appellee

vs.

City

COURT

No. 22

October Term, 1918.

Alton

COUNTY

John Strubel & Guy Helmick,

Partners, etc., Appellants

TRIAL JUDGE

HON. I. D. YAGER

Term No. 22.

In the Appellate Court
of Illinois, Fourth District
October Term, A. D. 1918.

Agenda No. 30

William C. Seiser,
Appellee

vs.

John Strubel & Guy Helmick,
Partners, etc.,

Appellants

213 I.A. 692

Appeal from City Court of
Alton, Illinois.

Opinion by Boggs, J.

In April, 1916, appellants had entered into a contract with the City of Alton, to pave Second Street, now Broadway, from Henry Street to Cherry Street in said City, and shortly thereafter sub-let the contract for concrete work to appellee. In the center of the street, at the place of the proposed improvement, was the track of the Alton, Granite & St. Louis Traction Company.

Appellants contend that the price agreed upon for the work was 60 cents a cubic yard for the street base and 75 cents a cubic yard for the street car base, but that they afterwards agreed to pay appellee 80 cents per cubic yard for the street car base. On the other hand appellee contends that he was to receive 20 cents a square yard for the street car base, eight inches thick, and 14 cents a square yard for the street base, six inches thick, provided, however, that if he should be able to complete 800 square yards per day he was then to receive 10¢ per square yard for the street base.

In the Appellate Court
of Illinois, Fourth District
October Term, A. D. 1918.

2181 A. 602

Appeal from City Court of
Alton, Illinois.

John Strubel & Guy Helmsick,
Petitioners,
vs.
Appellants

Present by Rogers, J.

In April, 1916, appellants had ordered into a contract with the City of Alton, to have second street, new Broadway, from Henry Street to Cherry Street in said City, and shortly thereafter entered the contract for concrete work to appellees. In the center of the street, at the place of the proposed improvement, was the track of the Alton, Granite & St. Louis Traction Company.

Appellants contend that the price agreed upon for the work was 60 cents a cubic yard for the street base and 75 cents a cubic yard for the street car base, but that they afterwards agreed to pay appellees 80 cents per cubic yard for the street car base. On the other hand appellees contend that he was to receive 80 cents a square yard for the street car base, eight inches thick, and 14 cents a square yard for the street base, six inches thick, provided, however, that if he should be able to complete 800 square yards per day he was then to receive 10¢ per square yard for the street base.

There is no dispute as to the amount of work done by appellee, it being conceded that there were 12,500 square yards, 6 inch cement paving base and 4140 square yards 8 inch paving base under street car tracks. Each of said parties also admit that one cubic yard of 8 inch base is equivalent to $4\frac{1}{2}$ square yards. According to appellee's contention he was entitled to \$2598.00 for the concrete work together with various items of incidental labor and expense, all totaling \$2694.60. Appellee had been paid \$1798.61 so that according to his contention there was a balance owing him of \$895.99 for which he instituted this action.

A trial was had resulting in a verdict in favor of appellee for \$859.88. A remittitur was entered reducing the amount of the verdict to \$789.39. for which amount the trial court entered judgment. The amount of the remittitur covered the amount of incidental expenses appellee was suing for.

Appellee insists that this appeal should be dismissed because he contends that the certificate of the clerk of the trial court is defective. We have examined the certificate of the clerk and are of the opinion that the objection made thereto by appellee is well taken. However, appellee has filed a brief and argument and we have therefore examined the record and have considered the case on its merits.

It is first contended by appellant that the Court erred in permitting the bill of particulars filed by appellee to be taken by the jury to their jury room. We think that appellant is correct in his contention, and that the Court should not have permitted the bill of particulars to be taken by the jury. The purpose of a bill of particulars is to give notice to the defendants of the items and amounts for which

There is no dispute as to the amount of work done by appellee, it being conceded that there were 10,000 square yards, 8 inch cement paving base and 4140 square yards 8 inch paving base under street car tracks. Each of said parties also admit that one cubic yard of 8 inch base is equivalent to 1/2 square yard. According to appellee's testimony he was entitled to \$2500.00 for the concrete work together with various items of incidental labor and expenses. All together \$444.60. Appellee had been paid \$1700.00 so that according to his contention there was a balance owing him of \$2695.93 for which he instituted this action.

A trial was had resulting in a verdict in favor of appellee for \$2695.93. A remittitur was entered reducing the amount of the verdict to \$750.00. For which amount the writ was set aside by judgment. The amount of the remittitur covered the amount of incidental expenses appellee was suing for.

Now to appellee insists that this appeal should be dismissed because he contends that the certificate of the clerk of the trial court is defective. We have examined the certificate of the clerk and one of the opinions that the opinion made thereto by appellee is well taken. However, appellee has filed a brief and argument and we have therefore examined the record and have considered the case on its merits. It is first contended by appellant that the court erred in permitting the bill of particulars filed by appellee to be taken by the jury to their jury room. We think that appellant is correct in his contention, and that the court should not have permitted the bill of particulars to be taken by the jury. The purpose of a bill of particulars is to give notice to the defendants of the items and amounts for which

claim is being made and to restrict plaintiff upon trial to proof of such items and prices. McDonald vs People 126 Ill. 161 Brewing Co. v. Farnsworth 172 Ill.247; Citizens Savings, Loan & Building Ass'n v. Weaver, 127 App.255. A bill of particulars is not evidence to be considered by the jury. However, in this case we are unable to see how appellant could have been in any way prejudiced on account of this ruling of the Court.

There is no dispute between the parties as to the amount of work done by appellee, nor as to the amount of money appellee had received on this work. The only questions in dispute were with reference to the contract as to the amount that appellee was to receive for the work done, and as to whether he was contracting to do the work by the square yard or by the cubic yard, and as to whether or not ~~he~~ he was to receive 14¢ per square yard as claimed by him if he was not able to complete 800 square yards per day. The jury could not have been misled by the bill of particulars in regard to these matters and the error in allowing the bill of particulars to go to the jury is not sufficient to warrant a reversal of the judgment.

It is next contended by appellant that the Court erred in giving the instruction given on behalf of appellee for the reason that the words "The Court" at the beginning of the instruction happened to be in red ink and the balance of the instruction was in black ink. This objection is without merit.

It is next contended by the appellant that the Court erred in allowing appellee's exhibit 1 to go to the jury for the reason that it is contended the computations

on the same were so uncertain and unsatisfactory as to be misleading to the jury. The figures were conceded to be the figures of appellant, Helmick and while un-explained, the jury might not get very much out of said Exhibit. But both appellee and appellant, Helmick, testified in reference thereto and we think that the Court did not err in allowing said exhibit to go to the jury with the testimony of the parties in connection therewith. It had a tendency to explain the transaction and tends to corroborate the testimony of appellee to the effect that the work was to be computed on the basis of square yards rather than cubic yards.

Lastly it is contended by appellant that the verdict of the jury is against the manifest weight of the evidence. The evidence with reference to the contract was sharply conflicting, but there is sufficient evidence in the record if taken as true by the jury to warrant the verdict. At any rate we are not able to say that the verdict of the jury is against the manifest weight of the evidence and the judgment of the trial court will therefore be affirmed.

Judgment affirmed.

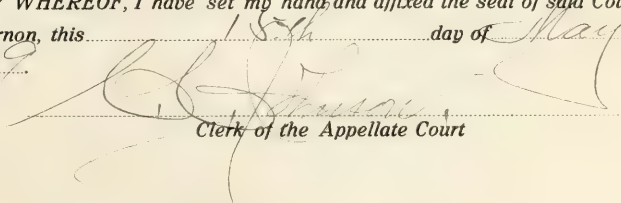
Not to be reported in full.

... the same facts as uncertain and unsatisfactory, as to
... to the jury. The figures were rounded so
... of appellant, Helms and while unexplained,
... not get very much out of said exhibits. And
... appellant and appellant, Helms, testified in reference
... and we think that the Court did not act in
... to go to the jury with the testimony of the
... in connection therewith. It had a tendency to ex-
... the transaction and tends to substantiate the
... to the effect that the work was to be
... basis of the evidence was not more than cubic yards.
... it is contended by appellant that the ver-
... of the jury is against the manifest weight of the
... evidence. The evidence with reference to the contract was
... conflicting, but there is sufficient evidence in
... the record if taken as true. The jury to warrant the ver-
... At any rate we are not able to say that the verdict
... of the jury is against the manifest weight of the evidence
... and the judgment of the trial court will therefore be
... affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1919


Clerk of the Appellate Court

OPINION

EE. §

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7200

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

213 I.A. 692

ERROR TO
APPEAL FROM

August J. Struif,

Appellee

vs.

Circuit COURT

No. 28

October Term, 1918.

Madison COUNTY

Charles W. Young,

Appellant

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 28.

In the Appellate Court
of Illinois, Fourth District
October Term, 1918.

Agenda No. 6

213 I.A. 692

August J. Struif, Appellee

vs

Charles W. Young, Appellant

} Appeal from Circuit Court of
Madison County, Illinois.

Opinion by Rogge, J.

An action on the case brought by appellee against appellant in the Circuit Court of Madison County, charging fraud and deceit on the part of appellant in the sale of certain Florida lands to appellee, resulted in a verdict and judgment in favor of appellee for \$1842.00. To reverse said judgment appellant prosecuted this appeal.

The declaration consists of two counts, each of which charge that appellant induced appellee through fraud and deceit to join with him in the purchase of a section of land in Lee County, Florida, at ten dollars an acre; that said lands at said time were only worth one dollar per acre and had been recently purchased by appellant at said price. Said declaration further alleges that appellant represented to appellee that he was paying ten dollars an acre for said land and appellee relying upon such representation consented to a joint purchase of ~~2~~ said land at said price --alleging damages, etc.

The evidence is conflicting on the issue as to whether appellant was acting as the agent of appellee in purchasing a half interest in said land. In other words,

Term No. 28. In the Appellate Court of Illinois, Fourth District, October Term, 1918.

2131 A. 692

August 1, 1918.

Charles W. Jones, Appellant, vs. Appellee.

An action on the case brought by appellee against appellant in the Circuit Court of Madison County, charging fraud and deceit on the part of appellant in the sale of certain Florida lands to appellee, resulted in a verdict and judgment in favor of appellee for \$242.00. To reverse said judgment appellant prosecuted this appeal.

The declaration consists of two counts, each of which charge that appellant induced appellee through fraud and deceit to join with him in the purchase of a section of land in Lee County, Florida, at ten dollars an acre; that said lands at said time were only worth one dollar per acre and had been recently purchased by appellee at said price. Said declaration further alleges that appellant represented to appellee that he was paying ten dollars an acre for said land and appellee relying upon such representation consented to a joint purchase of said land at said price -- alleging damages, etc.

The evidence is conflicting on the issue as to whether appellant was acting in the spirit of a police in purchasing a half interest in said land. In other words,

as to whether there was a confidential relation existing between appellant and appellee at the time said lands were purchased. The testimony on the part of appellee tends to prove that appellant came to his place of business on or about the 11th day of April, 1917, and tried to induce him to join in the purchase of said lands at Ten Dollars per acre; that appellant represented to appellee that the land would cost them that much and that appellee finally agreed thereto and paid appellant \$1600. by check and gave his note for the balance. On the other hand the testimony of appellant tends to prove that while he had talked at different times with appellee with reference to purchasing Florida lands that there was no agreement whatever with reference to the purchase of the land in question by them, jointly or as a partnership purchase and that he, himself, purchased the land and made a sale of the north half of said section of land to appellee outright.

There is some evidence in the record tending to prove that when appellee learned that appellant had only paid \$1.00 per acre for the land he became dissatisfied and that appellant offered to take the land off appellee's hands and return him his note and money but that on being assured by appellant that the land was all right, he concluded to keep the same. There is also some evidence in the record tending to prove that appellee agreed to pay appellant as his commissions one half of all he might sell the land for in excess of the \$10. per acre, the amount paid by appellee and that some few weeks after the sale by appellant to appellee, appellant found a purchaser for appellee's land at a substantial advance in price and that appellee refused to consummate the sale unless appellant would take as his com-

is it necessary to say a word about the evidence in
 two cases and appeal as the time said lands were
 owned. The testimony on the part of appellee tends to
 prove that appellant came to his place at business on
 the 15th day of April, 1889, and tried to induce him
 to join in the purchase of said lands at the balance per
 acre; that appellee represented to appellant that the land
 would cost them that much and that appellee finally agreed
 to sell the land at the balance. On the other hand the testimony of
 appellant tends to prove that while he had talked at dif-
 ferent times with appellee with reference to purchasing
 the land that there was no agreement between them with
 reference to the purchase of the land in question by them,
 jointly or as a partnership purchase and that he, himself,
 purchased the land and made a sale of the north half of
 said section of land to appellee outright.
 There is some evidence in the record tending to
 prove that when appellee learned that appellant had only
 paid \$1.00 per acre for the land he became dissatisfied and
 that appellant offered to take the land all appellee's money
 and return him his note and money but that on being assured
 by appellant that the land was all right, he concluded to
 keep the same. There is also some evidence in the record
 tending to prove that appellee agreed to pay appellant as
 his commission one half of all the profit said land for
 in excess of the \$20. per acre, the amount said by appellee
 and that some few weeks after the sale by appellant to appel-
 lee, appellant found a purchaser for appellee's land at a
 substantial advance in price and that appellee refused to
 consummate the sale unless appellant would take as his com-

missions \$500.00. He, appellee, being unwilling to pay one half of the excess as commissions.

We are not expressing any opinion as to the weight of the evidence in this case any more than to state that it is conflicting for the reason that the judgment will have to be reversed for errors committed by the trial court in the giving of the two instructions given on behalf of appellee, both of which were erroneous.

The first instruction being as follows: "The Court instructs the jury that if they believe from the evidence that A. J. Struif accepted and retained a deed for the land in question, and further believe that he was deceived by the defendant in this case and caused to pay ten dollars an acre, when, in fact, the purchase price was one dollar an acre, then the plaintiff may retain the deed and his damages is the difference between the amount paid and the real purchase price."

This instruction is erroneous for the reason that said instruction in effect directed a verdict and wholly fails to submit to the jury the question as to whether a confidential relation existed between appellant and appellee at the time of the purchase of the section of land by appellant and the conveyance of one half thereof to appellee.

The other instruction given on behalf of appellee is as follows: "The Court instructs the jury that if you believe from all the evidence in this case that representation made by the defendant, Charles W. Young, to the plaintiff, A. J. Struif, regarding the purchase price of the land in question were false and known to be false at the time made, by Young, and were relied upon by the plaintiff as true, then the plaintiff has the right to recover from the defendant the

... \$800.00. He, appellee, being unwilling to pay one
half of the excess as commissions. ...
... we are not expressing any opinion as to the weight
of the evidence in this case any more than to state that it
is well settled that the reason that the ... will ...
... reversed for errors committed by the trial court in
the giving of the two instructions given on behalf of appellee
... of which were erroneous. ...
... The first instruction being as follows: "The ...
... that if they believe from the evi-
... 2. Should accept and retained a deed for the
... and further believe that he was deceived
... in this case and caused for the defendant
... the purchase price was one dollar and
... then the plaintiff may retain the deed and his damages
is the difference between the amount paid and the real pur-
...
... This instruction is erroneous for the reason that
... directed a verdict and wholly
... the jury the question as to whether a
... was retained by the appellant and appellee
... of the purchase of the section of land by appel-
... of one half thereof as appellee.
... The other instruction given on behalf of appellee
is as follows: "The Court instructs the jury that if you
believe from all the evidence in this case that respondent
made by the defendant, Charles A. Young, to the plaintiff,
A. J. Smith, regarding the purchase price of the land in
question was false and known to be false at the time made,
then the plaintiff has the right to recover from the defendant the

difference between the actual cost price of the land at the time of such sale, and the price represented to the plaintiff by the defendant."

This instruction is erroneous for the reasons stated with reference to instruction number one.

Appellant also urges that the court erred in refusing to permit the introduction in evidence of the letter received by him from the Commissioner of Agriculture with reference to the value of the Everglad lands in Florida. The record discloses that this letter was exhibited to appellee prior to and at the time of the sale of the lands in question to him by appellant. That being true, we think the court should have admitted this letter in evidence and erred in failing to do so.

For the reasons above stated the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported in full.

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Appellant also ...
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For the reasons above stated the judgment of the
trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported in full.

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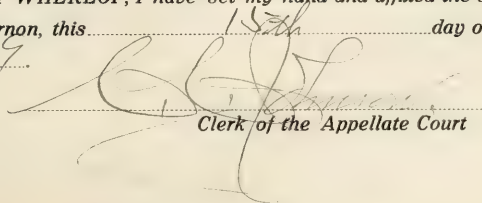
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1917.


Clerk of the Appellate Court

OPINION

EE. 3

4210

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Henry Campbell,

Appellee

vs.

No. 30

October Term, 1918.

Vandalia Railroad Company,

Appellant

213 I.A. 692

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

TRIAL JUDGE

HON. H. L. BROWNING

Journal of the Appellate Court

COURT, Begun and held at St. Louis, Missouri, on the fourth Tuesday
of our last one thousand nine hundred and nineteen the same
in part of our last one thousand nine hundred and nineteen

Hon. J. C. Easton
Presiding Judge
Hon. J. C. Easton
Presiding Judge
Hon. J. C. Easton
Presiding Judge

to wit: On the tenth day of April A.D. 1919, there was held in the
the court and before the court

31.1.1919

REPORT
FROM THE

THIRTY

1919

Agenda No. 36

2131.A.692

Applicant from City Court
of West St. Louis.

Honorable Judge, Appellate

vs.

Central Railroad Company,

Respondent.

Case No. 10,000.

This is an action in case brought by applicant
against respondent in the City Court of West St. Louis, for
damages sustained on June 28th, 1910, while applicant and some
other men were transporting lumber from a defective car to
applicant car in the yards of applicant at West St. Louis.
Applicant and his associates were hired, paid and
employed under the direction of one Nathan Thomas, who had
an oral contract with the defendant to transport freight in
its yards at West St. Louis at a certain rate per ton, the
rate differing for different classes of freight. Thomas
employed his own help and furnished his own tools with the
exception that occasionally he borrowed some tools from
applicant, such as a derrick or truck. Thomas was furnished
with an old car by applicant to use as an office and for
the storage of his tools.

The record discloses that Thomas was notified by the
yard foreman which car or cars were required to be unloaded
first, and it is testified that containing perishable freight
was brought in, under Thomas' employment, he must immediately
transfer the same, although he might be badly exposed in
transporting freight of less importance. The manner of doing
the work, the number of men employed, the wages paid to them

and the men he employed however was left entirely with Thomas.

On June 8th, 1916, appellee and three other men were engaged in transferring some heavy yellow pine lumber from a defective car which was set on a track slightly elevated and above the car into which the lumber was being loaded and was slid by means of skids from the upper to the lower car. Two men were in each car. Those in the upper car would place a piece of lumber on the skids and when the men in the lower car were ready, would slide the lumber onto the lower car and the two men thereon would adjust and load the same.

While thus engaged appellee was injured by being struck by a heavy beam and his leg broken between the ankle and knee. The evidence tends to show that the usual signal to get out of the way was given by the men in the upper car but for some reason appellee failed to hear or heed the warning. He was taken to the hospital and treated until discharged by appellant, Company's physician. No charge was made for the doctor's services. Appellee was in the hospital between three and four months and was able to do light work only for a period of about two months thereafter. He was employed by an Acid Company at \$2.56 per day. At the time of the injury he was earning \$2. per day.

Upon a trial by jury in the City Court of East St. Louis a verdict of \$1,500. was returned in favor of Appellee and judgment entered thereon. At the close of all the evidence appellant offered a motion to direct a verdict for appellant, which was denied.

Various errors were assigned on the record but in our view of the case it will only be necessary for us to

and the car was damaged but not seriously.

THE CASE

On June 25, 1916, appellee and three other men

were engaged in transporting some heavy yellow pine lumber

from a lumber yard which was set on a small hill.

Attracted and drove the car into which the lumber was being

loaded and was told by means of slides from the upper to the

lower car. Two men were in each car. Those in the upper

car were placed a piece of lumber on the slides and when the

men in the lower car were ready, would slide the lumber onto

the lower car and the two men there would adjust and load

the car.

At the time of the accident, appellee was injured by being

struck by a heavy beam and his leg broken between the ankle

and knee. The evidence tends to show that the usual safety

is not out of the way was given to the men in the upper car

but for some reason appellee failed to hear or heed the

warning. He was taken to the hospital and treated until

discharged by Dr. [Name], Company's physician. No charge

was made for the doctor's services. Appellee was in the

hospital between three and four months and was able to do

light work only for a period of about two months thereafter.

He was employed by an oil company at \$2.50 per day. At the

time of the injury he was earning \$2. per day.

Upon a trial by jury in the City Court of [Name]

appellee a verdict of \$1,000 was returned in favor of ap-

pelant and judgment entered thereon. At the close of all

the evidence appellant offered a motion to amend a verdict

was granted, which was denied.

Various errors were assigned on the record but in

our view of the case it will only be necessary for us to

consider the error assigned on the failure of the Court to direct a verdict in favor of appellant at the close of all the evidence.

The declaration, in substance, charges that appellee was in the employ of appellant, Company, at the time he received the injury and that at said time appellant was engaged in inter-state commerce. To said declaration the general issue was pleaded. Appellee's declaration charged and appellee contends that at the time of receiving the injury for which this suit was brought he was in the employ of appellant. Appellee on direct examination testified as a conclusion that he was working for the appellant Railroad Company, but on cross examination of appellee and his witness, John A. Williams, it clearly appears that appellee was not in the employ of appellant, but was in the employ of Thomas prior to and at the time of his injury. On cross examination appellee testified as follows:-

"Q". "Who were you working for?" "A". "Madison-- I was working for the Company." "Q". "Who employed you?" "A". "Madison Thomas." "Q". "Who paid you?" "A". "Madison Thomas." "Q". "On the matter of what you were to do and how you were to be paid, didn't you and Madison Thomas agree that he was to pay you so much a car, and he was boss of the job, wasn't he, and he told you what to do-- you called him foreman and he told you what car to unload or transfer didn't he?" "A". "Yes sir".

John Fitzpatrick, the agent of appellant at East St. Louis and Madison Thomas both testified specifically that Thomas was an independent contractor; that he furnished his own tools; that he employed, paid and discharged his own men, and that the Company had nothing whatever to do with employ-

The first error assigned on the bill of exceptions is that the court
 directed a verdict in favor of appellant on the close of all
 the evidence. This error is assigned on the bill of exceptions
 as follows: "The declaration, in substance, charges that appel-
 lee was in the employ of appellant, defendant, at the time he
 received the injury and that at this time appellant was not
 engaged in interstate commerce. To said declaration the plain-
 tiff's answer was pleaded. Appellee's declaration charged and
 the court sustained the bill of exceptions and found in
 favor of appellee. This was in the employ of appel-
 lee. Appellee's direct examination testified to a contract
 between him and appellant for the appellant Railroad Company,
 and on cross examination he testified that his witness John
 J. Williams, the plaintiff's witness, was not in
 the employ of appellant, but was in the employ of Thomas
 J. Williams at the time of his injury. On cross examination John

ing them, paying them, discharging them or with directing their labors; that the men employed by Thomas including appellee were responsible alone to him. It was the contention of appellee that appellant at the time of the injury in question was engaged in interstate commerce and that appellee, at the time he received his injury was so engaged as an employee of appellant, company. Before there can be any liability under the Federal employer's liability act the relation of master and servant must be shown. *Wagner v. C. & A.R.R.Co.* 265 Ill.245-250. *Wagner v. C. & S.R.R.Co.* 239 U.S.452; *Robinson v. B. & O.R.R.Co.* 237 U.S.93.

Under the facts as disclosed by this record appellee was not in the employ of appellant and the relation of master and servant a prerequisite to a liability under the Federal Employer's Liability Act did not exist between appellant and appellee at the time of the injury. *C.R.I. & P.Ry. Co.v.Hamler*, 215 Ill.525; *Chicago, R.I. & P.Ry.Co.v.Bond*, 240 U.S.449.

In *C.R.I. & P.Ry.Co.v.Hamler*, supra, the Court at page 532 says: "The Master of a servant is one to whose order he is subject, and the plaintiff was not subject to the order of the defendant in any particular and therefore was not its servant."

In *Chicago, R.I. & P.Ry.Co.v.Bond*, supra, the Supreme Court of the United States at page 452 speaking through Justice McKinney, in discussing the question as to whether a certain person was an independent contractor or not quoted the following testimony;- "Q. From whom did Turner get instructions about handling work performed by him? "A. Under his contract from us. "You directed him what to do? "A. Yes, either me or my chief clerk. "Q. So that he was under your

the time, saying there, disconcerting time on with driving

their factory, that the man employed by Thomas including

applies was responsible alone to him. It was the evidence

that of evidence that was taken at the time of the inquiry

it pointed out again in the evidence that was taken

applies, at the time he was taken the evidence was taken

as an evidence of evidence, company. Before that time he

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supervision and control all the time? "A. In so far as his contracts were concerned, yes sir. "Q. He performed his duties in accordance with what you directed him to do? "Yes sir. "Q. I will ask you if all this coal he handled for the shutes, if that was Rock Island coal? "A. Yes sir."Q. Did you have anything to do with directing him in detail as to how he performed the terms of his contract? "A. No, sir. And says "We are unable to concur with the learned Court in its conclusions. There was, it is true, and necessarily, a certain direction to be given by the Company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control, of an employee and a remedy against his incompetency or neglect.....The Railroad Company, therefore did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or in other words, did not retain control not only of what should be done but how it should be done. Citing, Singer Mfg.Co. v. Sahn, 132 U.S.518, New Orleans B. & O.R. Co.v.Manning, 15 Wall.649. Standard Oil Co.v.Anderson 212 U.S.215."

...in as far as the
contracts were concerned, was the "A". He performed his
duties in accordance with what you directed him to do. "Yes
sir." "I will tell you it all this week he handled for the
... it was Rock Island coal "A". Yes sir." "Did you
... as with ...
... the terms of his contract "A". Yes, sir. And says
... in concert with the ...
... There was, it is true, and necessarily, a certain
... or rather, we should
... But the manner of the
... to be done by him and those em-
... He was responsible for the ...
... the penalty of the instant ...
... This was only a ...
... necessary in view of the ...
... which was to make provision for a daily supply of
... The power given was
... one of control in a sense, but it was not a detailed control
... of the actions of ... of his employees. It was
... a ...
... It was not ...
... of the control, of an employee and a remedy against the in-
... The Railroad Company, therefore
... The ...
... as well as the ...
... or in other words, did not retain control not
... only of the ... but how it should be done. ...
... v. ... New Orleans ...
... v. ...

Considerable stress was placed by appellee's counsel on the fact that the physician who set appellee's leg and who waited on him in the hospital was employed and paid by appellant and not by appellee. The record, however, discloses that this physician was employed by appellant by the year and that it was his duty to render service to anyone who might be injured on the grounds of appellant or that might be injured or become sick while travelling on appellant's trains and that no account was kept of this service by the physician his yearly salary covering all said service of whatever character it might be.

We think, therefore, that while this might be a circumstance tending to corroborate appellee's theory of the case, provided there was competent evidence in the record tending to show appellee was an employee of appellant Company, but of itself, it is not evidence sufficient to establish said employment.

We are therefore of the opinion that the Court erred in failing to direct a verdict in favor of appellant.

We find as the ultimate fact in this case that appellee was not an employee or servant of appellant prior to and at the time of his injury and that there was therefore no liability on the part of appellant to appellee under the Federal Employers Liability Act.

Reversed with finding of fact.

Not to be reported in full.

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... and the witness ... in the hospital was ...

... by appeal and not by appeal. The second ...

... this physician was employed by ...

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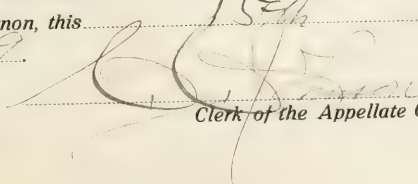
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1919


Clerk of the Appellate Court

OPINION

EE.S

7222

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Charles W. Young,
Appellee

vs.

No. 34
October Term, 1918.

Alton, Granite & St. Louis Traction
Co., Appellant

213 I.A. 692

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 34.

In the Appellate Court
of Illinois, Fourth District
October Term, A. D. 1918.

Agenda No. 33

Charles W. Young, Appellee

vs.

Alton, Granite & St. Louis

Traction Company, Appellant

213 I.A. 292

Appeal from Circuit Court
Madison County.

Opinion by Boggs, J.

An action on the case brought by appellee in the Circuit Court of Madison County to recover damages to his automobile caused by a collision with a car of appellant at Ninth and Alby streets, Alton, Illinois, resulted in a verdict and judgment against appellant for \$350.00. To reverse said judgment this appeal is prosecuted.

The declaration consists of two counts. The first count charges that appellant by its servants, operated a car propelled by electricity north on Alby street approaching Ninth street, which said street crosses Alby street at right angles; that plaintiff's automobile was in charge of and was being driven by plaintiff's son westward on the north side of Ninth street as appellant's car approached said street; that a passenger was in Alby street on the south side of Ninth street waiting for said car to stop and that the driver of said automobile expected said street car to stop; that appellant's motorman failed to stop the car and that he had his head turned to one side and drove the car negligently and rapidly ahead thereby causing said car

of Illinois, North District

October Term, A. D. 1912.

2131.1002

Appeal from Circuit Court
Madison County.

Charles W. Young, Appellee

vs.

William H. Young, Appellant

William H. Young, Appellant

An action on the case brought by appellee in the Circuit Court of Madison County to recover damages to his automobile caused by a collision with a car of appellant at the intersection of Fifth and Alby streets, Alton, Illinois, resulted in a verdict and judgment against appellant for \$300.00. To reverse said judgment this appeal is prosecuted.

The declaration consists of two counts. The first count charges that appellant by his servant, operated a car propelled by electricity north on Alby street approaching the Fifth street, which said street crosses Alby street at right angles; that plaintiff's automobile was in charge of and was being driven by plaintiff's son westward on the north side of Fifth street as appellant's car approached said street; that a passenger was in Alby street on the south side of Fifth street waiting for said car to stop and that the driver of said automobile observed said first car to stop; that appellant's automobile failed to stop the car and that he had his head turned to one side and drove the car negligently and rapidly ahead thereby causing said car

to run into and damage plaintiff's automobile.

The averments of the second count are practically the same as those of the first and in addition thereto set out Sec. 16 of an ordinance of the city of Alton, giving to vehicles and cars on the streets running east and west, the right of way at crossings over vehicles and cars on streets running north and south. To said declaration a plea of the general issue was filed. A trial was had resulting in a verdict and judgment as above set forth.

The record discloses that shortly after noon on July 3rd, 1917, appellant was operating a street car north on Alby street, towards Ninth street, which crosses Alby street at right angles. Appellee's son, who was twenty-one years old, was approaching Alby street on Ninth street driving appellee's automobile. There is a gradual decline on Ninth street as the same approaches Alby street from the west sufficiently sharp to require the use of brakes, and down which a car would coast if brakes were not applied. There is also a slight down grade on Alby street coming towards Ninth street from the south, the direction from which appellant's car was approaching.

The car in question was a disabled car, not carrying passengers, and was being taken to the sheds for repairs by a motorman and a car repairer. A lady was standing on Alby street some thirty feet south of Ninth street. Appellee's son testified he was driving said automobile at a speed of less than four miles per hour; that he saw the car approaching and saw said lady waiting to get aboard the car, as he supposed. When said street car was almost to Ninth street, he saw the motorman's head turned to the west, but supposed

1947

The average of the second count is practically

the same as those of the first and in addition there are 100
only 200, is an ordinance of the city of Boston, giving
to the police the right to stop any vehicle and to search
the right of way at crossings over vehicles and cars on
the right of way north and south. To this declaration a plea
of the city was filed. A trial was had resulting
in a verdict and judgment as above set forth.

the car would stop to take on said lady as a passenger; that he could have stopped the automobile then by simply pushing his foot down on the brake, but thinking the car was going to stop, he did not do so.

Appellee's son attempted to turn his machine to go in the same direction as the car--that is, north on Alby street, when a collision occurred, the automobile being struck back of the front wheel.

Appellant contends that the court erred in admitting in evidence Section 16, of said City ordinance because the certificate thereof did not show any posting or publication of such ordinance. So far as the record shows the ordinance prescribed no penalty for its violation. If it did not, it was not necessary that it be published and it was a valid ordinance though it prescribed no penalty. We think the ordinance sufficiently proven. *Chicago & N. W. Ry. Co. v. Hines*, 82 Ill. App. 488; *DeScheppers v. C. & N. W. Ry. Co.* 179 App. 301.

At the close of appellee's evidence and again at the close of all the evidence appellant made a motion and offered an instruction directing a verdict in favor of appellant, which motions were denied and the ruling of the court thereon is assigned as error.

It is the contention of appellant that the record discloses that appellee's son who was in charge of the automobile at the time it was injured was not in the exercise of due care for the automobile in question, and that his negligence directly contributed to the collision in question. Appellee's son is the only witness who testified on the part of appellee with reference to the facts in connection with

the car would stop to take on this job as a passenger; that he could have stopped the automobile then by simply pushing his foot down on the brake, but thinking the car was going to stop, he did not do so. The car attempted to turn the machine to the same direction as the car—that is, north on 15th street, where a collision occurred, the automobile driver drove back at the front wheel.

Appellant contends that the court erred in admitting in evidence Section 12, of said city ordinance because the ordinance thereof did not show any posting or publication of such ordinance. As far as the record now on the appeal is concerned, no penalty for its violation. It is said that it was not necessary that it be published and it was published and hence though it prescribed no penalty, the ordinance was sufficiently proven. Chicago & N. W. Ry. Co. v. Jones, 211 Ill. App. 489; Deobeggs v. C. & N. W. Ry. Co., 179 Ill. App. 541.

At the close of appellee's evidence and again at the close of all the evidence appellant made a motion and offered an instruction directing a verdict in favor of appellant, which motions were denied and the ruling of the court thereon is assigned as error.

It is the contention of appellant that the record discloses that appellee's son who was in charge of the motor vehicle at the time it was injured was not in the exercise of due care for the automobile in question, and that his negligence directly contributed to the collision in question. Appellee's son is the only witness who testified on the facts in connection with the collision.

the collision in question. He testified that he saw the street car coming North on Alby street, and that he saw a woman standing on the south side of Ninth street on Alby street and that he thought she was waiting to board said car; that he saw the car approach Ninth street as he was coming down the same, going west at a rate of speed of less than four miles per hour; that he had his foot on the brake as he descended toward the track at that place so that he could have stopped his car in time to have avoided the collision and would have done so except for the fact that he was of the opinion that the car would stop for the purpose of permitting said lady to board the same. That just as the car was nearing Ninth street he observed that the motorman had his head turned and was looking west; that he did not know the speed at which the street car was moving at that time. On the other hand the lady in question testified on behalf of appellant that the street car approached the crossing of Ninth street at a slow speed and that the bell on the car was being sounded. The car repairer that was on the car with the motorman testified he kept the bell ringing;--that the car was marked "special car" and had been injured and that they were taking it to the shop for repairs. The woman in question also testified that the car was marked "special car." While the section of the ordinance offered provides that vehicles and cars on streets running east and west should have the right-of-way over vehicles and cars on streets running north and south, appellee's son in his testimony does not rely on the provision of this ordinance.

We think, therefore, that appellee's son was guilty of negligence in driving his car on the track at a time when

he knew that the motorman in charge of the car did not see him and was not aware of his presence. The motorman who was in charge of the car at the time was not present and did not testify on the trial.

Other errors were assigned on the record but in our view of the case it is not necessary for us to discuss the same.

The judgment of the lower court will be reversed and the clerk will incorporate in the judgment as the finding of facts herein, that appellee's said son was guilty of negligence that directly contributed to the collision and the resultant injuries or damages to appellee's automobile.

Reversed with finding of fact.

Not to be reported in full.

as the fact that the statement in charge of the car did not see
the car and did not know of his presence. The statement was
not in charge of the car and did not know of his presence.
and not testify on the trial.

Other errors were assigned on the record and in
the view of the case it is not necessary for us to discuss
the same.

The judgment of the court is affirmed and the
case is remanded to the court below for further proceedings.

The court is further instructed to set aside the
verdict and to grant a new trial.

Reversed with finding of facts.
The court is further instructed to set aside the
verdict and to grant a new trial.

Not to be reviewed in full.
The court is further instructed to set aside the
verdict and to grant a new trial.

The court is further instructed to set aside the
verdict and to grant a new trial.

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verdict and to grant a new trial.

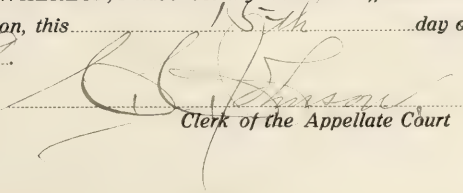
The court is further instructed to set aside the
verdict and to grant a new trial.

The court is further instructed to set aside the
verdict and to grant a new trial.

1918101

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1918


Clerk of the Appellate Court

OPINION

EE.S

4232

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Charles Rieth,

Appellant

vs.

No. 49

October Term, 1918.

W. T. Carpenter et al.

Appellees

213 I.A. 693

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON.

J. F. GILLHAM

Term No. 49.

In the Appellate Court
of Illinois, Fourth District
October Term A. D. 1918.

Agenda No. 12

Charles Mieth, Appellant

vs.

W. T. Carpenter, Alton Germania
Building and Loan Association of
Alton, Illinois, Samuel B. Jones,
John S. Jones and T. S. Howe,

Appellees

213 I.A. 693

Appeal from Circuit Court,
Madison County,
Illinois.

Opinion by Boggs, J.

Appellant filed a petition in the Circuit Court of Madison County against appellee to establish a mechanic's lien for \$468.68 on certain premises located in Wood River, Illinois. Appellant in said petition alleges that he was engaged in the business of selling building materials at Wood River, Illinois, and that from August 1913, to December 30, 1913 he had in his employ in said lumber yard, as "yard foreman", appellee, W. T. Carpenter; that it was his (Carpenter's) duty to sell lumber at prices stipulated in a list-book/which he was provided by the petitioner and to make a report in writing showing amount of all sales made by him and the amount of lumber and material delivered from said yard, such report to be made to petitioner once each week.

Appellant further alleges in his petition that appellee Carpenter, purchased the premises in question, together with other premises and that he began the construction of a dwelling house and other improvements on said lot, using lumber and building materials from the yard of appellant; that no account was kept of said materials and supplies by Carpenter and that the statement and account made by him did not correctly set forth the amount of materials used

2131 A. 603

Charles L. H. Appellant

Appeal from Circuit Court,

Madison County,

Illinois.

W. T. Carpenter, Appellee,
Building and Loan Association of
Madison County, Illinois,
James B. Jones and T. A. Howe,
Appellees.

Appellees

Submitted by Rogers, J.

Appellant filed a petition in the Circuit Court of Madison County against appellee to establish a mechanic's lien for \$488.68 on certain premises located in Wood River, Illinois. Appellant in said petition alleges that he was engaged in the business of selling building materials at Wood River, Illinois, and that from August 1917, to December 30, 1918 he had in his employ in said lumber yard, as "yard foreman", appellee, W. T. Carpenter; that it was his (Carpenter's) duty to sell lumber at prices stipulated in a list-book which he was provided by the petitioner and to make a report in writing showing amount of all sales made by him and the amount of lumber and material delivered from said yard, such report to be made to petitioner once each week. Appellant further alleges in his petition that appellee Carpenter, purchased the premises in question, together with other premises and that he began the construction of a dwelling house and other improvements on said lot, using lumber and building materials from the yard of appellee; that no account was kept of said materials and supplies by Carpenter and that the statement and account made by him did not correctly set forth the amount of materials used

and the prices therefor. Said petition further alleges that Carpenter fraudulently represented to petitioner that such materials used in the construction of said building and improvements were furnished to one T. S. Howe, when as a matter of fact Carpenter was using said building material for himself, and was using the name of Howe as a subterfuge in order to deceive petitioner.

It was further alleged that Carpenter caused a deed to be executed for the premises purchased by him to Samuel B. Jones and John S. Jones, and that thereafter he, Carpenter negotiated a loan from appellee, Building and Loan Association, for the sum of \$500. to be secured by a Mortgage given by the said John S. Jones and Samuel B. Jones; said petition further charges that the right of the Building and Loan Association under said Mortgage and the rights of the said John S. Jones and Samuel B. Jones under the deed to them was inferior to and subsequent to the rights of appellant under its purported mechanics lien, prays for a lien etc.

Answers were filed to said petition by appellees, Building & Loan Association and by the said W. T. Carpenter. In the answer filed by appellee, Building & Loan Association, it is denied that Carpenter has any interest in said premises and it is alleged that its rights under said Mortgage is a superior lien and that it is informed and believes that appellant has been paid in full for all materials furnished by him on said premises. The answer of W. T. Carpenter denies all charges of fraud; denies that the whole of the lumber for the building erected on the premises in question was furnished from the yard of appellant and alleges that the lumber purchased from the yard of appellant has been fully paid for.

Appellee, Building and Loan Association, filed a

and the prices therefor. This petition further alleges that Carpenter fraudulently represented to petitioner that such materials used in the construction of said building and improvements were furnished to one T. B. Howe, when as a matter of fact Carpenter was using said building materials for his own use and for the use of others as a warehouse in the building. It is further alleged that Carpenter caused a deed to be executed for the premises purchased by him to Jones, M. Jones and John S. Jones, and that thereafter Jones negotiated a loan from appellee, building and loan association, for the sum of \$500, to be secured by a mortgage given by the said John S. Jones and Samuel M. Jones; said petition further charges that the title of the building and loan association under said mortgage and the rights of the said John S. Jones and Samuel M. Jones under the deed to them are inferior to and subordinated to the rights of appellant under the purchase money lien, given for a loan etc. Answers were filed to said petition by appellee, building and loan association and by the said W. T. Carpenter. In the answer filed by appellee, building and loan association, it is denied that Carpenter has any interest in said premises and it is alleged that the rights under said mortgage are a superior lien and that it is informed and believes that appellant has been paid in full for all materials furnished by him on said premises. The answer of W. T. Carpenter denies all charges of fraud; denies that the whole of the lumber for the building erected on the premises in question was furnished from the yard of appellant and alleges that the lumber purchased from the yard of appellant has been fully paid for. Appellee, building and loan association, filed a

cross bill praying for the foreclosure of its Mortgage and for a prior lien on the premises. An answer to said cross bill was filed by appellant. The cause was referred to the Master on the bill and answers thereto and on the cross bill and answers thereto. The Master having taken the evidence reported the same to the Court, together with his conclusions of law and fact. The Master found the bill or petition of appellant to be without equity and recommended that the same be dismissed, and found for the Building and Loan Association, on the cross bill and recommended a decree of foreclosure on its said Mortgage. Exceptions were filed to the Master's Report by appellant which exceptions were over-ruled and a decree was entered by the Court in accordance with the report of said Master. To reverse said decree appellant prosecutes this appeal.

The record discloses that appellant, who resided in St. Louis, Missouri, owned a lumber yard at Wood River, and that prior to the employment of W. T. Carpenter therein he had had in his employ one W. J. Jordan, as his manager. One of the issues in this case is as to whether or not Carpenter who entered the employment of appellant about the time Jordan quit entered it as a yard foreman only, or as manager.

It is the contention of appellant that Carpenter was simply a yard foreman with limited authority to sell lumber at listed prices but without authority to collect and receipt for bills or to represent appellant in any other manner than as yard foreman and to sell lumber to be settled for in the office with the book keeper whose name was Swan. On the other hand appellees contend Carpenter was the general manager of appellant at Wood River and had full authority to sell lumber and building materials and collect money therefor

and to give receipts for money so collected.

The record discloses that Carpenter entered appellant's employ about September 1, 1913, and continued therein until sometime in the Month of January 1914. The record further discloses that during Carpenter's employment he purchased a lot from a Mrs. Haller and in the agreement therefor she was to convey the premises to Carpenter or anyone he might designate. Carpenter began the erection of a building on said premises, using in large part lumber from appellant's lumber yard. Before or about the time the building was completed, at the instance of Carpenter, Mrs. Haller conveyed said premises to Samuel Jones and John Jones. The Jones procured a loan from appellee, Building and Loan Association for \$500. on said premises and executed a mortgage therefor. Out of the proceeds of this loan certain bills were paid by the Loan Association and among them a check was given to W. T. Carpenter for \$318.20 for materials furnished for the erection of the building in question and Carpenter executed a receipt therefor in full in his own name. Carpenter left appellant's employ shortly thereafter and it is the contention of appellant that no account was made by Carpenter of the funds collected from the Building and Loan Association and that appellant has not in fact been paid for the lumber that went into the erection of said building and that the amount due him is something over \$400. On the other hand appellee, Building and Loan Association, contends that Carpenter was the manager and agent of appellant and as such was authorized to collect for materials sold by appellant and to execute a receipt therefor and that the receipt of Carpenter is binding on appellant.

Power to act generally in a particular business or a particular course of trade in a business, however, limited

and to give receipts for money so collected.

The record discloses that Carpenter entered upon appellant's employ about September 1, 1913, and continued therein until sometime in the month of January 1914. The record further discloses that during Carpenter's employment he procured a lot from a Mrs. Haller and in the agreement therefor she was to convey the premises to appellant or anyone he might designate. Carpenter began the erection of a building on said premises, using in large part lumber from appellant's lumber yard. Before or about the time the building was completed, at the instance of Carpenter, Mrs. Haller conveyed said premises to Samuel Jones and John Jones. The appellant a loan from appellant building and loan association for \$500 on said premises and executed a mortgage therefor. Part of the proceeds of this loan certain bills were paid by the loan association and among them a check was given to T. Carpenter for \$318.30 for materials furnished for the erection of the building in question and Carpenter executed a receipt therefor in full in his own name. Carpenter left appellant's employ shortly thereafter and it is the contention of appellant that no account was made by Carpenter of the funds collected from the building and loan association and that appellant has not as yet been paid for the lumber that went into the erection of said building and that the appellant due him is something over \$400. On the other hand appellant, building and loan association, contends that Carpenter was the manager and agent of appellant and as such was authorized to collect for materials sold by appellant and to execute a receipt therefor and that the receipt of Carpenter is binding on appellant.

Power to act generally in a particular business of a particular course of trade in a business, however, limited

would constitute a general agency - if the agent is so held out to the world, however restricted his private instruction may be. Story on Agency, Secs. 126, 127, 131, 132, 133. Doan v. Duncan, 17 Ill. 272. Crain v. National Ban, 114 Ill. 516; Noble v. Nugent, 89 Ill. 522; West side Hospital v. Riger, 139 App. 650.

It is also true that evidence of a prior general course of dealing between principal and agent is competent as tending to show the extent of the agency. Haas Lumber Co. v. Harty Bros. 169 App. 325; McIntosh v. Hanson, 106 App. 172.

In James v. Conklin & Hill, 158 App. 640, this Court in discussing the authority of agents and of the binding effect of payments made to an agent at page 644 says: "Payments made to an agent are good and obligatory upon the principal, in all cases where the agent is authorized to receive payment, either by express authority, or by that resulting from usage of trade, or from the particular dealings between the parties." Noble v. Nugent, 89 Ill. 522. Story on Agency, Sec. 429.

The principal is equally bound by the authority which he actually gives, and by that which by his own acts he appears to give. The principal is responsible for the appearance of authority". Smith v. Teoria Co. 59 Ill. 412; Phoenix Ins. Co. v. Stocks, 149 Ill. 319.

In Phoenix Ins. Co. v. Stocks, supra, the Court at page 335 says: "We think, under the facts of this case, the assured were warranted in treating the agent as a general agent of the Company. Persons dealing with an agent can not know, nor are they required to know, the limitations upon his power to represent his principal. The Company is bound by the acts

would constitute a general agency - if the agent is so held out

the world, however restricted his private instructions may

be. Story on Agency, Secs. 128, 127, 141, 182, 183. Doan v.

Doan, 14 Ill. 372. O'Neil v. National Bank, 114 Ill. 516;

Wells v. Nugent, 82 Ill. 127; West side Hospital v. Mayor,

It is also the evidence of a prior general

agency of dealing between principal and agent is competent

in dealing to the extent of the agency. Ames Lumber

v. Harry Brown, 189 Ill. 400, 388; McIntosh v. Wilson, 102 Ill. 173.

In James v. Conklin & Hall, 188 Ill. 340, this

was in discussing the authority of agents and of the kind-

ness of payments made to an agent at page 344 says:

"Payments made to an agent are good and obligatory upon the

principal, in all cases where the agent is authorized to re-

ceive payment, either by express authority, or by that re-

sulting from a course of trade, or from the particular dealings

between the parties." Noble v. Nugent, 82 Ill. 382. Story on

Agency, Sec. 489.

The principal is equally bound by the authority

which he actually gives, and by that which he gives by his own acts

he appears to give. The principal is responsible for the

appearance of authority." Smith v. Lewis, 62 Ill. 418;

Phoenix Ins. Co. v. Brooks, 149 Ill. 519.

In Phoenix Ins. Co. v. Brooks, supra, the Court at

page 535 says: "We think, under the facts of this case, the

assurances were warranted in treating the agent as a general agent

of the company. Persons dealing with an agent can not know,

nor are they required to know, the limitations upon his power

to represent his principal. The company is bound by the acts

of its agent in the exercise of powers within the apparent scope of his authority, unless limitation upon such powers is brought to the notice of the assured. Citing, Fire and Marine Ins.Co.v. Chestnut, 50 Ill.116; Electric Life Ins.Co. v. Fahrenkrug, 68 Ill.463; Home Life Ins.Co.v.Pierce, 75 Ill.426.

An examination of the record in this case satisfies us that appellant had clothed Carpenter with the apparent authority of general manager of his yard at Wood River, and as such was authorized to sell lumber, collect therefor and to give receipts to parties paying their lumber bills.

Jordan, the former employee of appellant was conceded by appellant to have been the manager of his yard at Wood River, testified that appellant brought Carpenter to his lumber yard at Wood River and introduced him as the man who was to take his, Jordan's place. Jordan further testified that he remained in the office for some two or three weeks and assisted Carpenter and instructed him about the duties of manager in connection with said business. He further testified that Carpenter sold lumber, collected therefor and receipted for lumber sold. Jordan says: "He took my place practically and I helped him occasionally, showed him the different ledgers, where to put and find the things, and also I helped him in figuring lumber, and also helped him make out the reports; he had the daily report to make out". Jordan also testified that Carpenter collected funds and deposited them in the bank to appellant's credit.

H.M.Clark, Cashier of the First State and Savings Bank of Wood River, testified, that appellant, as the Keith Lumber Company, kept an account at his bank. He further testified that Carpenter deposited funds to that account. He

at the time of the election of 1900, when the
... of the ...
... to the notice of the ...
... Co. v. ...
... No. 111,453; ...

An examination of the record in this case ...
... that applicant had ...
... of General Manager of his ...
... was authorized to sell lumber, collect ...
... to give receipts for ...
... Jordan, the former employee of ...
... by applicant to have been the manager of his ...
... further, testified that applicant brought Carpenter to ...
... yard at Wood River and introduced him as the ...
... to take him, Jordan ...
... he remained in the office for some two or three weeks
... and assisted Carpenter and instructed him about the duties
... of manager in connection with said business. He further
... testified that Carpenter sold lumber, collected ...
... received for lumber sold. Jordan ...
... and I helped him occasionally, showed him the
... different ledgers, where to put and take the ...
... also helped him in ...
... out the reports he had the daily report to ...
... also testified that Carpenter collected funds and deposited
... that in the bank to applicant's credit.
... H.H. Clark, General of the ...
... Bank of Wood River, testified that applicant on the ...
... Company kept an account in the bank. He further tes-
... tified that Carpenter deposited funds to that account. He

was asked this question: "Q" Do you know what position Mr. Carpenter occupied there?" His answer was: "He was the only man I knew in connection with the yard and the only man I knew until I saw Mr. Rieth. I never did see anyone else." "Q". "Was he transacting the business with the Lumber Yard" His answer: "All the business that we ever had with the yard was with Mr. Carpenter I mean while he was in charge".

Appellant concedes that Carpenter was furnished with a price list at which lumber could be sold and that he had authority to sell lumber. We think that the evidence clearly shows that without reference to the private instructions or private understandings between appellant and Carpenter so far as the business transacted by appellant was concerned at his Wood River office he clothed Carpenter with the apparent authority of general manager at that place. That being true, it necessarily follows that as such he had authority to bind appellant in the collection of lumber bills and in receipting bills for lumber sold. There is nothing in the record to show that appellee, Building and Loan Association had any notice that the authority of Carpenter was in any manner limited and they were therefore warranted in paying him for the lumber furnished from appellant's yard and taking his receipt therefor.

The Circuit Court was warranted in the finding and decree rendered in this case and the judgment will be affirmed.

Judgment affirmed.

Not to be reported in full.

...and this question: "Do you know what position Mr. Carpenter occupied there?" His answer was: "He was only man I knew in connection with the yard and the only man I knew until I saw Mr. Nisbitt. I never did see anyone else." "Was he transacting the business with the lumber yard?" His answer: "All the business that we ever had with the yard was with Mr. Carpenter. I mean while he was in charge." Appellant conceded that Carpenter was furnished with a price list at which he could be sold and that he had authority to sell lumber. The evidence clearly shows that without reference to the private financial time or private understandings between appellant and Carpenter so far as the business transacted by Carpenter was concerned at his Wood River office he clothed Carpenter with the apparent authority of General Manager at that place. That being true, it necessarily follows that as soon as he had authority to bind appellant in the collection of lumber bills and in redemptive bills for lumber sold. There is nothing in the record to show that appellee, Hollings and Loan Associates, had any notice that the authority of Carpenter was in any manner limited and they were therefore warranted in relying on him for the lumber furnished from appellant's yard and taking his receipt therefor.

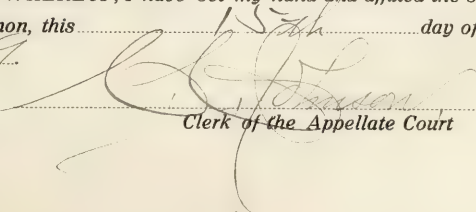
The Circuit Court was warranted in the finding and decree rendered in this case and the judgment will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of May
A. D. 1917


Clerk of the Appellate Court

OPINION

EE. S



424a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton
(appointed April 4th 1919)
GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Peter Bayer,
Appellant
vs.
No. 51
October Term, 1918.
Alton, Granite & St. Louis Traction
Co., Appellee

213 I.A. 693

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. L. D. YEAGER

Term No. 51.

In the Appellate Court

Agenda No. 27

of Illinois, Fourth District

October Term, A.D. 1918.

Peter Bayer, Appellant

vs.

Alton, Granite & St. Louis

Traction Company,

Appellee

213 I.A. 693

Appeal from Circuit Court

Madison County,

Illinois.

Opinion by Boggs, J.

This is an action in case brought by appellant against appellee for personal injuries alleged to have been sustained while attempting to alight from a street car of appellee's on September 24, 1917.

The declaration consists of two counts to which the general issue was pleaded. No question is raised on the pleadings. The only question raised and argued on this appeal is the amount of the verdict returned by the jury. Appellant testified that on the evening in question he had been attending a Labor Day picnic at Horseshoe Lake in Madison County, Illinois, and boarded one of appellee's cars about 8:00 o'clock P.M. to return to his home in Granite City; that the car was crowded and that he in company with his daughter and two friends rode in the vestibule or outer platform of said car; that they had expected to get off at L. street in Granite City, but were informed by the conductor the car would not stop there, but would stop at H. street; that on arriving at L. street the car stopped and appellant's daughter got off but before appellant could get off and while he had one foot on the step and the other in the act of stepping down,

In the Appellate Court
of Illinois, Northern District
October Term, A.D. 1918.

2131 A. 693

Appeal from Circuit Court
Madison County,
Illinois.

First Party, Appellant

vs.

Second Party, Appellee

Madison County,
Illinois

Opinion by Rogers, J.

This is an action in case brought by appellant
against appellee for personal injuries alleged to have been
sustained while attempting to alight from a street car of
appellee's on September 14, 1917.

The declaration consists of two counts to which the
general issue was pleaded. No question is raised on the
pleading. The only question raised and argued on this appeal
is the amount of the verdict returned by the jury. Appellant
insisted that on the evening in question he had been atten-
ded a Labor Day picnic at Horse Shoe Lake in Madison County,
Illinois, and boarded one of appellee's cars about 8:00
o'clock P.M. to return to his home in Granite City; that the
car was crowded and that he in company with his daughter and
two friends rode in the vestibule or outer platform of said
car; that they had expected to get off at . . . street in
Granite City, but were informed by the conductor the car would
not stop there, but would stop at . . . street; that on arriving
at . . . street the car stopped and appellant's daughter got
off but before appellant could get off and while he had one
foot on the step and the other in the act of stepping down,

the car started with a jerk which threw him to the pavement; that he attempted to hold to the grab-iron and was dragged some distance. Appellant was corroborated by his daughter and by the witness J. F. Reeder as to the principal facts above stated.

On the other hand the motorman and conductor in charge of appellee's car both testified that they did not remember of seeing appellant on the evening in question and that they did not know any one was hurt and did not hear anything about an alleged accident until some time thereafter. The conductor and motorman in charge of the car also contradicted appellant and his witnesses in various other matters testified to by them.

Appellant was fifty-two years old at the time of the injury. He had been employed at a Rolling Mill in Granite City and was earning thirty-two cents per hour and working ten hours per day. He was confined to his bed for some four weeks and lost thirty-two days time from his work. He testified that he suffered with pains across his back and over the region of the liver and kidneys, and that following the accident he vomited blood and passed blood from his kidneys, but to no great extent.

The physician who waited on appellant testified that there were bruises on appellant's right arm and back but that the skin was not broken; that appellant claimed to have vomited blood and to suffer pain in his back and kidneys; that an examination of his urine disclosed slight traces of blood and albumin, but that these conditions passed away within about two weeks and that so far as those conditions were concerned he was practically normal. The doctor without giving the number of visits or examinations made by him testi-

fied that his bill was about \$100. or \$105.00.

The jury returned a verdict of \$100. for appellant and the court after overruling a motion for a new trial rendered judgment thereon. To reverse said judgment this appeal is taken.

Of the several errors assigned, only that of the amount of the verdict is argued. We will therefore treat the errors not argued as waived. *Honk vs. Caseyville Ry.Co.* 202 App.641-645; *Findall v. Chi. & Northwestern Ry.Co.* 200 App.575.

While it is within the province of an Appellate Court to reverse and set aside a verdict for insufficiency as well as for excessiveness of damages, it will not be done except where the amount of the verdict is manifestly against the weight of the evidence. *Bourke v. Anglo-American Provision Co.*, 90 App.226; *Kozlowski vs. City of Chicago*, 113 App. 513-515; *Bolles v. Bloomington & Normal Ry.Electric & Heating Co.* 130 App.263.

In *Bolles v. Bloomington & Normal Ry. E. & H. Co.* supra, at page 266, the court says: "Unless therefore some error prejudicial to appellant, occurred in the trial, we would not be justified in disturbing the same. Courts are usually ~~undisposed~~ disposed to increase verdicts for damages for the reason that juries rarely underestimate them, 13 Cyc.135. At common law new trials were not allowed on the ground that the damages allowed by the jury in actions for torts were insufficient, and, as a general rule, a new trial will not be granted on the ground that the damages are too small, in actions for wrongs and injuries. *Backett v. Pratt*, 52 App. 340; *Hamilton v. Ry. Co.* 104 App.205/."

that his bill was about \$100.00 of 1888.
 The jury returned a verdict of \$100.00 for appellant.
 The court after overruling a motion for a new trial
 sustained judgment thereon. To reverse said judgment this
 writ is taken.

Of the several errors assigned, that of the
 amount of the verdict is argued. We will therefore
 not errors not argued as waived. *North v. Northwestern Ry. Co.*
100 App. 641-42; Indell v. Chl. & Northwestern Ry. Co.
100 App. 678.

While it is within the province of an appellate
 court to reverse and set aside a verdict for insanity
 as well as for excessiveness of damages, it will not do so
 where the amount of the verdict is manifestly against
 the weight of the evidence. *Bourke v. Anglo-American Trav.*
100 App. 626; Kozlowski vs. City of Chicago, 118 App.

Bolles v. Bloomington & Normal Ry. Co., 118 App.
100 App. 626; Bolles v. Bloomington & Normal Ry. Co., 118 App.
 In *Bolles v. Bloomington & Normal Ry. Co.*, 100
 App. 626, the court says: "Since therefore some
 error prejudicial to appellant occurred in the trial, we
 would not be justified in disturbing the same. Courts are
 usually supposed to increase verdicts for damages for the
 reason that juries rarely underestimate them. 13 Cyc. 150.

At common law new trials were not allowed on the ground that
 the damages allowed by the jury in actions for torts were in-
 sufficient, and, as a general rule, a new trial will not be
 granted on the ground that the damages are too small, in
 so far as for wrongs and injuries. *Macbeth v. Macbeth, 82 App.*

340; *Hamilton v. Ry. Co., 104 App. 608.*

The question then for us to determine is whether we should reverse the judgment for the reason that the verdict is manifestly too small under the evidence. If the jury had given the full amount testified to by the physician with reference to his bill and the full amount for the time appellant testified he lost, as the wages he was receiving, the damages would have amounted to a little over \$200.00. The doctor, however, did not undertake to give the number of visits he made or the different items of his bill, but simply stated that his bill would be in the neighborhood of from \$100. to \$105.00. It would seem that for all the services that it was necessary for the doctor to render according to his testimony his bill would be rather large and it may be that the jury were of the opinion that the evidence did not justify a charge of that character. While the evidence in this case would have justified a larger verdict at the same time in view of the uncertain testimony of the physician with reference to his bill and in view of the conflicting evidence with reference to the question of appellant receiving the injury sued for by him we are not disposed to disturb the same.

The judgment of the trial court will therefore be affirmed.

Judgment affirmed.

Not to be reported in full.

The judgment of the trial court will therefore be affirmed.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of May A. D. 191

[Signature]
Clerk of the Appellate Court

OPINION

EE. S

.....

4257

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Grant E. Newport,

Appellee

vs.

No. 54

October Term, 1918.

Illinois Central Railroad Co.,

Appellant

213 I.A. 693

ERROR TO
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. JAMES C. MC BRIDE

Term No. 54

In the Appellate Court
of Illinois, Fourth District
October Term, A. D. 1918.

Agenda No. 39

Grant B. Newport, Appellee

vs

Illinois Central Railroad

Company,

Appellant

213 I.A. 693

Appeal from Circuit Court

Marion County.

Opinion by Boggs, J.

This is an action on the case brought by appellee under the Federal Employer's Liability Act against appellant in the Circuit Court of Marion County, to recover damages for personal injuries alleged to have been sustained by being thrown from a freight car while a switchman in appellant's yards at Centralia, Illinois.

The first count alleges that appellee was a switchman in the employ of appellant at the time of the injury in question; that it was the duty of appellant to equip its cars with automatic couplers in accordance with the provisions of the Act of Congress in relation thereto; etc. and then avers, "that while riding on the ladder of the south car of said train for the purpose aforesaid, and while said train was going at a rapid rate of speed, the other switchman, whose duty it was to uncouple the cars upon which the plaintiff was riding and which were intended to be switched on said No. 6 switch track, attempted to uncouple said string of five or six cars from the other cars in said train attached to said engine, and by reason of the defendant's negligence and failure to provide said cars with automatic couplers and

In the Appellate Court
of Illinois, Fourth District
October Term, A. D. 1918.

2131.A. 693

Appeal from Circuit Court

Marion County.

Appellee

vs

Illinois Central Railroad

Appellant

Present by brief, etc.

This is an action on the cross brought by appellee against the Federal Employer's Liability Act against appellant in the Circuit Court of Marion County, to recover damages for personal injuries alleged to have been sustained by being thrown from a freight car while a switchman in appellant's employ at Centralia, Illinois.

The first count alleges that appellee was a switchman in the employ of appellant at the time of the injury in question; that it was the duty of appellant to equip its cars with automatic couplers in accordance with the provisions of the Act of Congress in relation thereto; etc. and then avers "that while riding on the ladder of the south car of said train for the purpose aforesaid, and while said train was going at a rapid rate of speed, the other switchman, whose duty it was to uncouple the cars upon which the plaintiff was riding, and which were intended to be switched in said No. 6 switch track, attempted to uncouple said riding car five or six cars from the other cars in said train attached to said engine, and by reason of the defendant's negligence and failure to provide said cars with automatic couplers and

by reason of said couplers being improperly adjusted and being out of order, said other switchmen were unable to uncouple said couplers without going between the ends of said cars and in consequence thereof, failed to uncouple said cars and as a result thereof when the engineer in charge of the switch engine brought the cars attached thereto to a sudden stop for the purpose of kicking in said cars upon which the plaintiff was riding and permitting said cars to run in on No. 6 track, all of said cars, including the car on which the plaintiff was then riding were brought to a sudden and violent stop, whereby the plaintiff was jerked and thrown from near the top of said car off of the ladder on which he was clinging upon the ground with great force and violence."

Appellee further avers that as a result of the violent jar which he received when he was thrown from said car, he was ruptured and a hernia was produced; and his spine was injured, etc.

In the said second count appellee alleges that he received a violent shock which resulted in inguinal hernia, and his spine, nerves and internal organs were wrenched, bruised and injured and he was obliged to submit to a surgical operation and has since been afflicted with kidney and bowel trouble, with loss of strength and has been hindered and prevented from following his usual vocation, etc. To said declaration appellant filed a plea of the general issue. A trial was had resulting in a verdict and judgment in favor of Appellee for \$5000.00. To reverse said judgment this appeal is prosecuted.

The record discloses that appellee was employed by appellant as a switchman in its yards at Centerville, Illinois;

he was known as "long field man" whose duty it was to mount the cars when being kicked on to a switch and to apply the hand brake in order that the car cut loose may be stopped when desired. He was fifty-one years of age and had had about twenty years experience in switching yards and railroad work. Appellant operated a system of railroads extending thru Illinois, Kentucky, Tennessee, Iowa and other states; two of its main roads converge at Centralia, Illinois, where it was operating a large terminal yard, south of that city. There were twelve tracks in the receiving yards at that time. Eight were known as classification tracks and four receiving tracks. Freight trains coming in to this terminal containing both inter state and intra state freight were first placed upon the receiving tracks and then were broken up by switching crews and distributed on to the classification tracks. One of these tracks known as No. Six was used for making up trains of thru or inter state freight. The cars carrying inter state freight were marked with a figure "4" in chalk and were called four-spots.

Appellee testified that about 10:30 on the night of March 30, 1916, the switching crew coupled on to a string of cars on the receiving track and pushed them in on track No. 6. Appellee further testified that he attempted to mount the end car which was designated as a "four spot"; that he had a lantern in one hand and a brake club in the other and just as he was getting upon top of the car, the engineer having stopped his engine, the string of cars came to a sudden stop with a jerk which threw him around in front of the car; that he held for a moment with his hand and then fell to the ground, alighting on his feet and falling forward on his hands. The top of the car was about thirteen feet from

The witness, a "long field man" whose duty it was to mount
 the gun when being kicked on to a switch and to swing the
 gun back in order that the car out loose may be stopped
 when desired. He was fifty-one years of age and had been
 about twenty years employed in switching yards and railroad
 work. Appellant was a member of a union of railroad
 men, Illinois, Kentucky, Tennessee, Iowa and other states;
 two of the main roads were at Centralia, Illinois.
 When it was operating a large terminal yard, south of that
 city. There were twelve tracks in the receiving yards at that
 time. They were used as classification tracks and four
 receiving tracks. Freight trains coming in to the terminal
 consisting both inter state and intra state freight were
 first placed upon the receiving tracks and then were broken
 up by switching crews and distributed on to the classifica-
 tion tracks. One of these tracks known as No. six was used
 for making up trains of four or inter state freight. The
 cars carrying intra state freight were mixed with a freight
 car in which and were called four-up-ten.
 Appellant testified that about 10:30 on the night
 of June 30, 1910, the switching crew coupled on to a string
 of cars on the receiving track and pushed them in on track
 No. 6. Appellant further testified that he attempted to mount
 the end car which was designated as a "four up-ten"; that he
 had a lantern in one hand and a brake club in the other and
 that as he was getting upon top of the car, the engineer
 having stopped his engine, the string of cars came to a stop.
 He was with a jerk which threw him around in front of the
 car; that he held for a moment with his hands and then fell
 to the ground, alighting on his feet and falling forward on
 his hands. The top of the car was about fifteen feet from

the ground.

Appellee worked the balance of the night and was working the next night until about four o'clock in the morning; he then discovered he had a swelling on his right side or groin; he was visited by appellant's physician who examined him on April 1st, saying he had a rupture or a sprain and ordered him to Chicago to the Chief Surgeon, who operated on him for hernia. Appellee further testified he was in the hospital at Chicago for about three weeks and that shortly after he returned home he suffered with a looseness of the bowels which developed to such an extent that he could not control them, and that he was unable to continue his usual employment because of such trouble and the consequent loss of strength. He further testified that prior to the accident he had been a strong able bodied man and had passed, in 1912, 1915 and in March 1916, the physical examination required by appellant Company.

The principal grounds relied upon for a reversal of this judgment are the court's rulings on the evidence, and instructions and it is further contended that the verdict is against the manifest weight of the evidence. The only evidence in the record with reference to how the injury occurred is that of appellee. There was no corroborating evidence other than the testimony of certain employees of appellant, Railroad, who were allowed over the objection of appellant to testify that at other times they had had difficulty with the automatic couplers in that they were not always able to lift the pin without going in between the cars, and that when this occurred, if the engineer in switching would stop his engine, it would cause a sudden, severe jerk, especially in the car farthest from the engine, if there were any number

the ground.

Appellee worked the balance of the night and was working the next night until about four o'clock in the morning. He discovered he had a swelling on his right side of the neck; he was visited by appellee's physician who examined him and said he had a rupture of a sprain and referred him to Dr. Chas. Surgeon, who operated on him for hernia. A police further testified he was in the hospital at about three weeks and that shortly after he returned home he suffered with a loosening of the muscle which developed to such an extent that he could not control the same, and that he was unable to continue his usual work because of such trouble and the consequent loss of strength. He further testified that prior to the accident he had been a strong able bodied man and was in 1912, 1913 and in March 1916, the physical examination required by appellee company.

The principal grounds relied upon for a reversal of this judgment are the court's rulings on the evidence, and instructions and it is further contended that the verdict is against the manifest weight of the evidence. The only evidence in the record with reference to how the injury occurred is that of appellee. There was no corroborating evidence other than the testimony of certain employees of appellee, who were allowed over the objection of appellant to testify that at other times they had not difficulty with the engine, but that they were not always able to lift the pin without going in between the cars, and that when this occurred, it was engaged in switching would stop his engine, it would cause a sudden, severe jerk, especially in the car farthest from the engine, if there were any number

of cars being switched.

We think the court erred in permitting witnesses to testify as to what occurred at times other than the occasion in question. One of the questions in the case was whether the hernia which appellee suffered and the condition with reference to his bowels was the result of his being thrown from the car. Dr. Stokes, the only physician to testify on behalf of appellee had never examined him until about two weeks before the trial. This witness testified that "he had never had any acquaintance with Grant M. Newport, until about two weeks ago, I think, I had occasion to examine him. I found a relaxed condition of the rectum. The walls of the bowels were very relaxed." This witness was then asked the following question: "Q. Doctor, if a man was thrown from the side of a box car on the 30th of March, 1916, resulting in a fall of some ten feet to the ground below, and lighting on his feet and falling forward that produced a hernia, and after he was operated on for the hernia there was a looseness of the bowels, which continued, and later on this prolapsis developed, which still exists as you saw it, what would you say, from your experience as a physician, as to whether or not the prolapsis was caused by the fall?" This question was objected to on the ground that there wasn't any prolapsis shown to have been developed until February 1917. The question was then amended by changing the words "later on" to "February 1917". The question was further objected to for the reason it states that the fall produced this hernia. The court over-ruled the objection and the witness answered. "A". "I think the same fall that would produce a hernia, might have produced the prolapsis." This ruling of the court is assigned as error.

to have been written.

It would be a great pity if it were not so.

It would be a great pity if it were not so. In the case of the question, one of the questions in the case was whether the hernia which appeared suffered and the condition of the bowels was the result of the hernia. It was shown from the case, Dr. Stokes, the only physician to testify on behalf of the accused had never examined him until about two weeks before the trial. His witness testified that he had no personal acquaintance with Great M. Newport, until about two weeks ago, I think, I had occasion to examine him. I found a relaxed condition of the rectum. The walls of the rectum were very relaxed. This witness was then asked the following question: "Doctor, if a man was lying on his back on the side of a box car on the 30th of March, 1917, and in a fall of some ten feet to the ground below, and lighting on his feet and falling forward just produced a hernia, and after he was operated on for the hernia there was a loosening of the bowels, which continued, and later on this prolapse developed, which still exists as you saw it, would you say, from your experience as a physician, as to whether or not the prolapse was caused by the fall?" This question was objected to on the ground that there wasn't any prolapse shown to have been developed until nearly 1917. The question was then amended by changing the words "faller on" to "falling on". The question was further objected to for the reason it states that the fall produced the hernia. The court overruled the objection and the witness answered: "I think the same fall that would produce a hernia, might have produced the prolapse." His ruling of the court is regarded as correct.

One of the contested questions in the case is as to whether the hernia in question was the result of appellee's fall. Dr. Isemann, the physician who performed the operation testified that the hernia he found on appellee was not, in his judgment, the result of a traumatic injury; that said hernia is what is known as indirect inguinal hernia, being one which developed in the groin; that that kind of a hernia is usually contained in a sack. He further testified that in this operation the sack was adherent to all the structure around it; that it had grown to it, and that that would indicate it had been there for quite a while,-- for at least six weeks. The operation had been performed only about four or five days after appellee fell from the car. Another physician who testified on behalf of appellant and who saw appellee soon after he fell and who had directed him to the physician in Chicago testified that a hernia of this character was not the result of a traumatic injury.

It was therefore a controverted question in this case as to whether or not the hernia suffered by appellee was the result of his fall from the car. It was, therefore, error for the court to allow counsel for appellee to assume in stating his question that the hernia resulted from this fall as that was a question for the jury. Inasmuch as the only expert testimony in the record which in any way attempts to connect the bowel trouble or prolapses alleged to be suffered by appellee with his fall is the testimony of Dr. Stokes, the error in permitting him to answer a hypothetical question which assumed that the hernia in question was caused by his fall is of so serious a nature as to require a reversal of the case. C. & A. R. R. Co. v. S. & N. W. R. R. Co. 67 Ill.142;

the case is as follows: The question was the result of a hernia or of a traumatic injury. The physician who performed the operation testified that the hernia he found on appeal was not, in his judgment, the result of a traumatic injury. That said, it is known as indirect inguinal hernia, being one which develops in the groin; that that kind of a hernia is usually contained in a shock. He further testified that in this operation the bowel was adherent to all the surrounding tissue and that it had to be torn away from it, and that that would have been done for quite a while. For at least the operation had been performed only about four or five days after appeal fell from the car. Another physician who testified on behalf of appellant and who saw appellant after he fell and who had directed him to the physician in Chicago testified that a hernia of this character was not the result of a traumatic injury.

It was therefore a controverted question in this case as to whether or not the hernia suffered by appellant was the result of his fall from the car. It was, therefore, for the court to allow counsel for appellant to assume in stating his question that the hernia resulted from this fall as that was a question for the jury. Inasmuch as the only expert testimony in the record which in any way attempted to connect the bowel trouble or proptosis alleged to be caused by appellant with his fall is the testimony of Dr. Stokes, the error in permitting him to answer a hypothetical question which assumed that the hernia in question was caused by his fall is of so serious a nature as to require reversal of the case. C. W. R. Co. v. R. W. Co., 101 U.S. 631 (1879).

Pyle v. Pyle, 158 Ill. 289; Keefe v. Armour & Co. 258 Ill.28;
Horst v. St.L.El.Ter.Ry.Co. 199 App.169.

The case of Bissong v. Willard, decided in the Appellate Court of the Third District on the 19th day of April 1918, is a case in point on the proposition that the injury must be shown to have caused the damages alleged to have been suffered. The court in its opinion says: "We do not find any evidence in the record showing that the neurasthenic condition of appellee resulted from or was caused or aggravated by the collision and she is not entitled to recover for such condition without some proof tending to connect such condition with the alleged injury. Appellee concedes that no evidence was offered of expert witnesses to show that a condition, similar to that of appellee nearly two years after the collision, would result from such an accident or such an injury as was received by appellee."

It is also contended by appellant that the court erred in giving the third instruction given on behalf of appellee. We have examined these instructions and find no serious objections thereto. The court did not err in giving the same.

It is also contended by appellant that the court erred in refusing to give the one refused instruction on the part of appellant. We have examined this instruction and also examined the instructions given on behalf of appellant and are of the opinion that in view of the instructions that were given it was not error to refuse the instruction referred to.

It is also contended by appellant that the evidence is not sufficient to show that appellant was engaged in inter-

...the same. ... It is also contended by appellant that the court ... We have examined these instructions and find no ... The court did not err in giving ... It is also contended by appellant that the court ... We have examined the instructions given in behalf of appellant ... and any of the opinion that in view of the instructions that ... were given it was not error to refuse the instruction requested ... It is also contended by appellant that the evidence ... is not sufficient to show that appellant was engaged in inter-

state commerce at the time of the alleged injury. The record discloses that classification track No. 6 is the track on which the cars that were to be sent south of the Ohio river were placed and that the car on which appellee was climbing at the time he was thrown from the same was a car known as a "four spot" car, so we are of the opinion that the evidence was sufficient for the jury to find that both appellant and appellee at the time of the injury were engaged in interstate commerce. *Staley v. I. C. R. R. Co.* 268 Ill.356-358; *C. R. I. & P. Ry. v. Industrial Board*, 273 Ill.528-530; *Mitchell v. Louisville & Nashville R. Co.* 184 App.77.

For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

Not to be reported in full.

1. The first of these is the fact that the Commission has not yet received any information from the Government regarding the progress of the investigation into the activities of the various groups and individuals mentioned in the report.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of May A. D. 1919

Charles C. Johnson
Clerk of the Appellate Court

OPINION

E. S.

426a

Present:

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

Mary Bender
vs.
Appellee

No. 2
October Term, 1918.

East Side Lane and
Sanitary District and
City of St. L. Ry. Co.
Appellee

~~ERROR TO~~
APPEAL FROM

vs.

No. 4

October Term, 1918.

COURT

COUNTY

TRIAL JUDGE

HON.

Term No. 2.

In the Appellate Court,

Agenda No. 2

Fourth District.

October Term, 1918.

213 I.A. 693

Mary Bender,
Appellee.

vs.

East Side Levee & Sanitary
District, and Cleveland, Cincinnati,
Chicago & St. Louis Railway Co.,
Appellant.

} Appeal from Circuit
Court of Madison
County, Ill.

McBride, J.

Upon the trial of this case in the Circuit Court a judgment was rendered in favor of the appellee and against appellants for \$3083.55, to reverse which this appeal is prosecuted.

It appears from the record that in about the year 1903 the appellant Railroad Company constructed a railroad extending through the lands of appellee, entering the east half of section 12 at about a quarter of a mile west of the north east corner of said Section and extending diagonally through said section to the southwest at an angle of about forty-five degrees and passing out of said section at about a quarter of a mile east of the southwest corner of the section; and that at the time of the construction of said railroad it built an embankment of the height of four to five feet upon which the railroad was placed. Prior to 1910 the appellant Levee & Sanitary District obtained a charter authorizing it to construct a canal from Cahokia Creek west the distance of about four and one-half miles to the Mississippi river. In about the years 1910 and 1911 the canal was constructed and passed along the south side and adjoining

1. The first stage of the process is the identification of the problem.

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Little, and not really

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... ..

Appellant.

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Upon the trial of this case in the Circuit Court a
verdict was rendered in favor of the appellee and against
the appellant for \$2000.00, to reverse which this appeal is
presented.

It appears from the record that in about the year 1903 the appellant Railroad Company constructed a railroad extending through the lands of appellee, entering the east half of section 12 at about a quarter of a mile west of the north east corner of said section and extending diagonally through said section to the southwest at an angle of about forty-five degrees and passing out of said section at about a quarter of a mile east of the southwest corner of the section; and that at the time of the construction of said railroad it built an embankment of the height of four to five feet upon which the railroad was placed. Prior to 1911 the appellant levee & ventuary district obtained a charter authorizing it to construct a canal from Calcasieu Creek west the distance of about four and one-half miles to the Mississippi river. In about the years 1910 and 1911 the canal was constructed and passed along the south side and adjoining

appellee's lands which were located principally in the west half of section twelve, Township four North, Range nine west of the Third Principal Meridian, in Madison County, Illinois. This canal when constructed was of the width of about one hundred fifty feet and embankments were thrown upon either side of the canal and that the embankment upon the north side and next to appellee's land was of the width of about fifty feet at the bottom and about ten feet at the top and of the height of about ten feet. This canal and these embankments crossed the appellant's railroad right of way about twelve hundred feet west of the southwest corner of appellee's land. Thereupon the appellant railroad raised its embankment about five feet higher and joined it on to the embankment made by the Levee & Drainage District. At about _____ feet east of the place where the two embankments united the appellee Drainage & Levee District placed a twenty-four inch pipe through the north levee or embankment. This pipe, or intake, was equipped with a valve operated by a means of a screw upon one side and upon the other it had a flap valve designed to operate automatically by water pressure. This appears to have been the only outlet or means of permitting the water to escape either to the south or west near the point where the two embankments united, and was at the time of the injury complained of closed. It appears that some distance northwest from this the railroad had an opening in its embankment but it was not at a place to relieve the pressure at or near the junction of the two embankments. It further appears from the evidence that the lands of appellee in the main sloped and drained to the south while some of them drained immediately to the northwest but eventually returned to the south. During the years

The canal was constructed in the year 1854, and was
 half of section twelve, Township four North, Range nine West
 of the Third Principal Meridian, in Madison County, Illinois.
 This canal when constructed was of the width of about one
 hundred feet, and embankments were thrown upon either
 side of the canal and that the embankment upon the north
 side was next to appellee's land and of the width of about
 fifty feet at the bottom and about ten feet at the top and
 of the height of about ten feet. This canal and these em-
 bankments crossed the appellant's railroad right of way
 about twenty hundred feet west of the southwest corner of
 appellee's land. Thereupon the appellant railroad raised
 its embankment about five feet higher and joined it on to
 the embankment made by the horse & carriage railroad. At
 least east of the place where the two embank-
 ments united the appellee railroad a levee which placed a
 twenty-four inch pipe through the north levee or embankment.
 This pipe, or intake, was equipped with a valve operated by
 a means of a screw upon one side and upon the other it had
 a flap valve designed to operate automatically by water
 pressure. This appears to have been the only outlet or means
 of getting the water to escape either to the north or
 west near the point where the two embankments united, and
 was at the time of the injury completely closed. It ap-
 pears that some distance north-west from this two railroad
 had an opening in its embankment but it was not at a place
 to relieve the pressure at or near the junction of the two
 embankments. It further appears from the evidence that the
 lands of appellee in the main along and drained to the
 south while some of them drained immediately to the north.
 The water eventually returned to the south.

1912 and 1915 respectively, heavy rain falls occurred and in each year the water was collected upon appellee's land to a depth of about two and one-half to three feet and was held upon the lands in 1912 for a period of about ten days and in 1915 for a period of about two weeks and destroyed appellee's crops, washed out the surface of several acres of land and deposited a lot of chat, cinders and other substances upon the said lands injuring them. At the time that the waters were standing upon appellee's land at the depth of about two and one-half to three feet the water next to the embankments of appellants and at the place where the embankments were joined together was of the depth of about five feet and so remained during the respective periods above mentioned.

The judgment was rendered in this case against the appellants for the loss of the crops and the injury to the lands as above described.

The declaration, after alleging the natural flow of the waters from appellee's land and describing the embankments above referred to and erected by the appellants respectively, charges that in the construction and maintenance of said levees and embankment the said defendants failed and neglected to exercise reasonable care to provide and maintain proper and adequate openings or outlets through said levees or embankments for the waters flowing and coming upon plaintiff's said lands and premises to escape and then avers that by reason of the rain falls above described that large amounts of water were accumulated upon appellee's lands by reason of the improper maintenance of the said embankments and injured the crops and lands as above set forth.

and injured the crops and lands above set forth.

by reason of the temporary maintenance of the said embankments
large amounts of water were accumulated upon appellee's lands
which, that by reason of the said falls above described that
upon appellee's said lands and premises to escape and then
and levees or embankments for the waters flowing and coming
within river and adequate openings or outlets through
and neglected to exercise reasonable care to provide and
names of said levees and embankment the said respondents failed
respectively, charges that in the construction and mainte-
nances above referred to and created by the appellants
of the waters from appellee's land and describing the on-
set of the defendants, after alleging the natural flow
of the river.

that the judgment was rendered in this case against the
appellants for the loss of the crops and the injury to the
land.

that and so remained during the respective periods above
said have joined together was of the depth of about five
feet of appellants and at the place where the embank-
ment was made and appellee to prove that the water went to the
land of appellee upon appellee's land at the depth of
and the same was lighting them. At the time that the
land was reported a lot of other, citizens and other subscribers
appellants' crops washed out the surface of several acres of
land in 1913 for a period of about two weeks and destroyed
them was the lands in 1913 for a period of about two weeks
a depth of about two and one-half to three feet and was
damages done by the defendants.

The principal error assigned and argued by the appellants is that there is no joint liability of the appellants to the appellee. It is claimed by appellants that even though admitting that the erection of the embankment caused the obstruction of waters from flowing from appellee's lands, that the erecting of the embankments were separate and independent acts of the appellants respectively and that there was no concert of action between them and for that reason there could be no joint liability. It is probably true that if the acts are separate and independent and do not combine to produce the injury and no duty devolved upon both defendants to repair the negligent acts complained of, that a joint liability would not exist. It appears to us from the reading of this record that when the appellants joined their embankments and thereby formed a pocket in which waters might collect that they should have seen to it that proper openings or outlets were made in these embankments to permit such waters to pass through them as would have passed that way in a state of nature and having failed so to do a joint liability exists. Reference is made by appellants to the case of Yeazel vs. Alexander, 58 Ill., 234 but this case only announces the general rule without reference to any combinations to give effect to the independent acts and we do not regard it as controlling. In the case of Equitable Powder Mfg. Co., vs. C.C.C. & St.L.R.R.Co., 155 App., 272, so strongly insisted upon by counsel for appellants, we do not believe that it is controlling for the reason that it appears to us from the reading of this case that the independent acts had not constituted a combination. Where the separate and independent acts combine to produce an injury, whether the acts were committed at the same time or not, if

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they are continuing acts and by their combination produce an injury to another we can see no reason why both parties are not liable either jointly or severally for the injury committed. It is said by our Supreme Court, where different persons owe the same duty and their acts naturally tend to the same breach of that duty the wrong may be regarded as joint and both be held liable. "The evidence showed the common duty owing by both of the defendants to the public, resulting from the situation and proximity of the wires and the use of the dangerous agent by the Economy Light and Power Company. The evidence tended to show a concurrent neglect of the common duty which rested upon both the defendants, and the negligence was joint in its character." Economy Light and Power Co., vs. Miller, 203 Ill., 520. And this same doctrine is announced and sustained in the case of Nordhaus vs. Vandalia R. R. Co., 242 Ill., 166.

What is the situation in this case? The appellant Levee and Drainage District threw up an embankment that obstructed the flow of the water to the south; thereupon the Railroad Company built its embankment about five feet higher and the two embankments were joined together and formed a continuous embankment on the south and west, preventing the water from flowing in its natural course, without any openings or outlets for the water to escape except a twenty-four inch pipe located in the south embankment, a short distance east from the junction which proved to be wholly insufficient to permit the waters to escape. At least it should have appeared to the appellants, and each of them, at the time of the joining of their embankments that this would create an obstruction to the flow of the waters south and west, and it became their duty and the duty of each of them to see to it

that proper outlets were made in the embankments to permit the water to flow off in a state of nature. Where a duty rests upon two or more persons to repair, a failure to do so is a common neglect of duty and both will be liable either jointly or severally to one who is injured in consequence of such neglect. City of Georgia vs. Simpson, 110 Ill., 294.

It is next insisted by counsel for appellant that the condemnation proceedings and the deed to a small strip of land executed to the appellant Drainage District, and the right of way obtained by the appellant Railroad Company bar the appellee from any recovery against the appellant herein. The argument and authorities cited by counsel for appellant upon this question are upon the principle that where a permanent structure has been erected under condemnation proceedings or otherwise, that all of the damages and liabilities accrue at the time of the erection of said permanent structure and must be assessed at that time, and bars a further recovery. In this case it must be borne in mind, however, that property acquired for public use, even though condemnation may be had and compensation paid for the property, that it is implied that the structure will be properly erected and without negligence in its construction. In the condemnation proceedings the land owner is awarded such damages to his land not taken as necessarily results from the proper construction of the road and no more. Miller vs. C. & E. I. R.R.Co., 60 App., 51. Where, for example, a railroad company acquires property over a depression in land under such condition, "the law requires that when an embankment is laid across a depression in land, suitable and reasonable openings shall be made to permit the escape of accumulating

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waters, and this condition is implied in the assessment of damages. Ohio & M. R. R. Co. vs. Wachter, 123 Ill., 440; Ohio & M. R. R. Co. vs. Thillman, 143 Ill. 127." Miller vs. C. & E. I. M. R. Co. Supra.

It will be observed that this is an action for an improper construction and maintenance of the respective embankments. If the embankments were improperly constructed or constructed without sufficient outlets for the natural flow of water, then a continuing liability exists and the former recovery by way of condemnation or otherwise would not be a bar to the right of action. The Supreme Court has said, in the case of Sanitary District of Chicago vs. Ray, 192 Ill., 66, "This action was based on negligence in construction and maintenance, whereby the land was caused to overflow, a cause of action which the land owner could not anticipate and could not recover for in the condemnation proceedings. It arose subsequently to the condemnation. We are unable to agree with appellant that appellee is barred by the judgment in the condemnation suit. Ohio & Mississippi Railway Co. vs. Wachter, 123 Ill., 440." We do not believe that the condemnation proceedings or the acquisition of the property by deed bars the appellee of a right to recover for the improper construction of the embankments.

It is next insisted that there is no liability because the rain falls were unprecedented and it therefore came within the rule of being an act of God and excusing the appellants from liability. The evidence tends to show that there was a very heavy rain fall, in the month of July 1912 and in August 1915, and some of the evidence tends to show that there was a rain fall in August of as much as eight and one-half inches. The evidence further tends to show that on

that there was a rain fall at least as much as that on
and in August 1919, and some of the evidence tends to show
that there was a very heavy rain fall in the month of July 1918
The evidence further tends to show that on
the date of the fire, the evidence tends to show that
the rain fall was unprecedented and at the same time
that it is not unusual that there is no liability be-
for the improper construction of the equipment.
property, and that the owner of a right to recover
that the condemnation proceedings or the acquisition of the
property, Gov. v. Webster, 108 103, 440. We do not believe
the judgment in the present case. With a knowledge
to cases with evidence that evidence is proved by
It arose subsequently to the condemnation. We are
convinced that the owner of the property could not

occasions prior to this there had been heavy rain falls in 1869, 7.83 inches within a period of thirty hours, and in 1848 within a period of five hours there was a rain fall of 6.17 inches, together with a statement of witnesses that in former years rain falls equaled the ones in question. To say the least of it the evidence upon this question was somewhat conflicting and was certainly a question proper for the determination of the jury, and with the evidence for appellant tending to show it was unprecedented and the evidence of appellee tending to show that such rain falls had occurred at several times prior to this, we do not feel called upon to determine that this rain fall was unprecedented, at least to that extent that it would relieve the appellants from liability. Even though a rain fall may be more than ordinary yet if it be such as has occasionally occurred and may occur at irregular intervals it is to be foreseen that it will occur again and it is the duty of those restraining the flow of water to provide against the consequences that will result from it. "In any event this was solely a question for the jury and if they were correctly instructed on that point this court cannot interfere". C. F. & St.L.M.v.s. Reuter, 225 Ill., 387. This identical question and these particular rain falls have been before this court upon other occasions and we have in each instance contented ourselves with the verdict of the jury upon that question and we see no reason for changing it and we cannot say that this would be any reason why the judgment should be reversed.

The next point argued by counsel for appellant is, "That this record discloses so far as the appellant Sanitary District particularly is concerned that its entire works con-

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~~XXXXXXXX~~ stituted one lawful permanent structure for or on account of which there can be but one recovery". This point was fully considered under a former objection urged by appellants and heretofore passed upon in this opinion. We cannot see that there is any difference between the rights of a Drainage District and the rights of the Railroad Company in this respect, as the appellee is not seeking to recover on account of the permanency of the structure but on account of the insufficient and defective construction of the embankment in question.

It is next urged that the court erred in giving appellee's Third instruction as to the measure of damages for injuries to the realty. The injury complained of here was not contemplated or could not have been at the time of the alleged condemnation proceedings and was caused, as found by the verdict of the jury, by the negligent construction of the embankment in question, and being so we can see no reason why the instruction should have been refused.

The objection made to the fourth instruction given on behalf of appellee, which is to the effect that the court erred in directing the jury not to consider the evidence offered as to damages paid to appellee in the condemnation proceedings; this instruction is in harmony with the views herein above expressed and we see no reason why it should not have been given.

It is next insisted that appellee's sixth instruction should not have been given, which tells the jury, in part, that appellants were under the duty to so construct the levee with reasonable openings or other reasonable provisions to permit the free passage of the water from the land of the plaintiff in its natural course. In the criticism offered

...witnessed one lawful permanent resident ...
on account of which there can be but one ...
...full consideration under ...
...plaintiff and defendant passed upon in this ...
...see that there is no difference between the rights ...
...language admitted and the ...
...this respect, as the appellee is not seeking to recover ...
...of the permanency of ...
...insufficient and defective ...
...is question.

It is next urged that the court erred in giving ...
...appellee's third instruction as to the measure of damages for ...
...to ... The injury ... of ... was not ...
...or could not have been at the time of the ...
...condemnation proceeding and was caused, as found by ...
...the verdict of the jury, by the negligent construction of the ...
...in question, and being so we can see no reason ...
...instruction should have been refused.

The objection made to the fourth instruction given ...
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...proceedings; this instruction is in harmony with the view ...
...herein above expressed and we see no reason why it should not ...
...have been given.

It is next insisted that appellee's sixth instruction ...
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...that appellee were under the duty to so construct the ...
...leaves with reasonable openings or other reasonable ...
...to permit the free passage of the water from the land of the ...
...plaintiff in its natural course. In the criticism offered

and in quoting the instruction the words "in its natural course" are omitted; and it is said that one of the theories of defendant was that there was an unprecedented rain fall and that this instruction ignores this defense. We do not believe that this instruction is subject to the criticism that it ignores the defense of extraordinary or unprecedented rain falls as it limits the rights to recovery for obstructing the flow of waters in its natural course, and has no reference to extraordinary rain falls. The jury were fully instructed upon the question as to the effect that should be given to unprecedented rain falls.

Objection is made to the refusal of appellant's instructions numbered from one to seven inclusive. The first four of these instructions were given, in substance, by other instructions and the remainder of the refused instructions were, in our judgment, properly refused for reasons set forth in the opinion.

It is next urged that the court erred in admitting the testimony of the witness Cillham with reference to a bridge that had been constructed by the Wabash railroad years prior to this time. We do not believe that this testimony was material to the issue tried but do not think it was of such importance as to require a reversal of this case.

The evidence in this case when considered together tends to prove that the natural flow of the water from off of appellee's lands was obstructed by these embankments, that her crops were destroyed, and the jury having found that this destruction of crops was caused by the negligent acts of the appellants we cannot say that their verdict is manifestly against the weight of the evidence or that the court committed any reversible error in the trial of the case, and the judgment of the lower court is affirmed. Judgment affirmed.
Not to be reported in full. -10-

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of May

A. D. 1919

Charles C. Johnson
Clerk of the Appellate Court

OPINION

E.E.S



727a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The National State
Bank of Metropolis, Ill.
Plff in Error

213 I.A. 693

ERROR TO
APPEAL FROM

vs.

No. 15
October Term, 1918.

J. H. Koile - In Pleaded
with D. B. Smith
J. R. Cooney and
F. W. Bowman
Plff in Error

Circuit COURT

Massac COUNTY

TRIAL JUDGE

HON.

Mr. A. B. Butler

Term No. 15.

In the Appellate Court

Agenda No. 23

Fourth District.

October Term A. D. 1918.

The National State Bank of
Metropolis, Ill.
Defendant in error

vs.

F. H. Korte Impleaded with
D. B. Klutts, W. R. Cromeens &
F. W. Bormann,
Plaintiff in Error.

213 I.A. 693

Error to the Circuit Court of
Massac County, Ill.

LeBride, J.

This writ of error is prosecuted to set aside a judgment rendered in favor of defendant in error and against the plaintiff in error, et al, by default in the Circuit Court of Massac County, on January 20, 1916, for the reason that the declaration is insufficient to support the judgment rendered.

The declaration set forth in the pleadings and abstract is as follows: "State of Illinois, Massac County, SS. In the Circuit Court to the January Term A. D. 1916. The National State Bank of Metropolis, Plaintiff, by F. A. Evans, its attorney, complains of D. B. Klutts, F. H. Korte, W. R. Cromeens, F. W. Borman, defendants of a ples of trespass on the case on promises; for that whereas one Bennett Borman Brick & Tile Company a corporation organized and doing business under and by virtue of the laws of the State of Illinois, on etc., being indebted to plaintiff in the sum of \$9997.00, made and executed its promissory note in said amount and thereby then and there promised to pay plaintiff on demand the said sum of \$9997.00, with interest thereon at the rate of seven per cent per annum after the date thereof and

2131A.693

Error to the Circuit Court of
Kane County, Ill.

It is hereby ordered that the
judgment in error
be reversed.

W. W. Foreman, Plaintiff with
J. R. Cromens, &
J. R. Cromens, Defendants.

This writ of error is presented to and made a judgment rendered in favor of defendant in error and against the plaintiff in error, et al, by default in the Circuit Court of Kane County, on January 26, 1916, for the reason that the defendant is entitled to judgment as against the plaintiff and the plaintiff is not entitled to judgment as against the defendant.

The record is as follows: "State of Illinois, Kane County, ss. I, the Circuit Court to the January Term A. D. 1916. The National State Bank of Metropolis, Plaintiff, by H. A. Evans, its attorney, complains of J. R. Cromens, P. R. Kufus, W. R. Fort, W. R. Cromens, V. W. Foreman, defendants of a plea of trespass on the case on premises; for that whereas one Bennett Norman Brick & Tile Company a corporation organized and doing business under and by virtue of the laws of the State of Illinois, on etc., being indebted to plaintiff in the sum of \$9997.00, made and executed its promissory note in said amount and thereby then and there promised to pay plaintiff on demand the said sum of \$9997.00, with interest thereon at the rate of seven per cent per annum after the date to wit and

delivered its said note to the plaintiff; and thereupon it afterwards becoming desirous to demand the payment of the said note and the indebtedness therein mentioned, the plaintiff asked payment thereof unless said note should be further guaranteed by the defendants, and thereupon in consideration that the plaintiff at the request of the defendants would not demand immediate payment of the said note and the indebtedness therein mentioned but would give further time thereon to the said Bennett Borman Brick & Tile Company for the payment thereof, the defendants by their separate endorsement on said note then and there guaranteed the payment of the said sum of money and promised the plaintiff to pay it the same according to the tenor and effect of the said note, if the said Bennett Borman Brick & Tile Company should not pay the same. And the plaintiff avers that thereupon it, confiding in the said undertaking of the defendants, then and there forbore in its demand for the immediate payment of the said note and the indebtedness therein mentioned, and then and there gave extended time to said Bennett Borman Brick & Tile Company for the payment thereof; and although the day of payment in the said note specified has elapsed, and the payment of the said note having been demanded of the said Bennett Borman Brick & Tile Company, it did not and would not pay the same but refused so to do; whereof the defendants on the day last aforesaid there had notice. Yet the defendants have not paid to the plaintiff the amount of the said note or any part thereof but refuse so to do; to the damage of the plaintiff in the sum of \$10500.00, and therefore it brings suit."

The plaintiff in error in the original brief contended that it appeared from the return of the Sheriff that

October Term A. D. 1918.

21317.093

Plaintiff to the Circuit Court
Massachusetts County, Ill.

State Bank of
Ill.
Defendant in error

W. R. Cromens
W. R. Cromens &
Attorneys at Law

This writ of error is prosecuted to set aside a judgment rendered in favor of defendant in error and against the plaintiff in error, et al, by default in the Circuit Court of Mass. County, on January 20, 1916, for the reason that the declaration is insufficient to support the judgment rendered. The declaration set forth in the pleading and abstract is as follows: "State of Illinois, Mass. County, ss. In the Circuit Court to the January Term A. D. 1916. The National State Bank of Metropolis, Plaintiff, by W. A. Wynn, its attorney, complains of D. M. Kintz, D. M. Korte, W. R. Cromens, T. W. Foreman, defendants of a plea of trespass on the case on promise; for that whereas one Bennett Norman Brick & Tile Company a corporation organized and doing business under and by virtue of the laws of the State of Illinois, on etc., being indebted to plaintiff in the sum of \$2297.00, made and executed its promissory note in said amount and thereby then and there promised to pay plaintiff on demand the said sum of \$2297.00, with interest thereon at the rate of seven per cent per annum after the date thereof and

delivered its said note to the plaintiff; and thereupon it afterwards becoming desirous to demand the payment of the said note and the indebtedness therein mentioned, the plaintiff asked payment thereof unless said note should be further guaranteed by the defendants, and thereupon in consideration that the plaintiff at the request of the defendants would not demand immediate payment of the said note and the indebtedness therein mentioned but would give further time thereon to the said Bennett Borman Brick & Tile Company for the payment thereof, the defendants by their separate endorsement on said note then and there guaranteed the payment of the said sum of money and promised the plaintiff to pay it the same according to the tenor and effect of the said note, if the said Bennett Borman Brick & Tile Company should not pay the same. And the plaintiff avers that thereupon it, confiding in the said undertaking of the defendants, then and there forbore in its demand for the immediate payment of the said note and the indebtedness therein mentioned, and then and there gave extended time to said Bennett Borman Brick & Tile Company for the payment thereof; and although the day of payment in the said note specified has elapsed, and the payment of the said note having been demanded of the said Bennett Borman Brick & Tile Company, it did not and would not pay the same but refused so to do; whereof the defendants on the day last aforesaid there had notice. Yet the defendants have not paid to the plaintiff the amount of the said note or any part thereof but refuse so to do; to the damage of the plaintiff in the sum of \$10500.00, and therefore it brings suit."

The plaintiff in error in the original brief contended that it appeared from the return of the Sheriff that

Delivered the said note to the plaintiff; and thereupon it is
afterwards becoming necessary to amend the payment of the
said note and the indebtedness therein mentioned, the plain-
tiff asked the court to direct the defendant to pay the
amount of the said note, and the defendant is requested
that the plaintiff at the request of the defendant shall
demand immediate payment of the said note and the in-
debtedness therein mentioned but would give further time
to the said Bennett Hornum Brick & Tile Company for
the payment thereof, the defendant by their separate en-
tlement on said note then and there guaranteed the payment
of the said sum of money and promised the plaintiff to pay it
the same according to the tenor and effect of the said note,
if the said Bennett Hornum Brick & Tile Company should not
pay the same. And the plaintiff avers that the company is
contingent in the said undertaking of the defendant, then
and there foreborne in its demand for the immediate payment of
the said note and the indebtedness therein mentioned, and
then and there have extended time to said Bennett Hornum
Brick & Tile Company for the payment thereof; and although
the sum of payment in the said note specified was elapsed,
and the payment of the said note having been demanded of the
said Bennett Hornum Brick & Tile Company, it did not and would
not pay the same but refused so to do; whereof the defendant
on the day last aforesaid there had notice. Yet the defen-
dant have not paid to the plaintiff the amount of the said
note or any part thereof and refuse so to do; to the damage
of the plaintiff in the sum of \$1000.00, and therefore it
prays suit.

The plaintiff in error in the original brief con-
tended that it appeared from the return on the writ that

there was not proper service of process but after the writ of error was issued proceedings were had in the Circuit Court whereby the return of the Sheriff was amended so as to make the return regular, and this error was then abandoned and other errors assigned. The first of which is that any person who signs his name upon the back of a note under the present statute incurs liability of an endorser only and is not liable upon the note if payable on demand, as this note was, unless the note is presented to the maker for payment within a reasonable time after its issue and payment is refused, and unless notice of such dishonor is given to the endorser that the instrument is dishonored, and then contends that not one of these facts is alleged in the declaration.

It is true that the declaration does not allege the time that payment of the note was demanded but it does allege that payment of the note was demanded and refused and that plaintiff in error had notice on that very day of the refusal of the maker to make payment. It was not necessary that any definite time should have been fixed for the extension if it is understood that the debtor shall be and is indulged for a reasonable time. *McLicken vs. Jafford*, 197 Ill. 540.

It appears from the record in this case that evidence was heard but there is no bill of exceptions preserving the evidence and we must presume that the time of the extension was shown to be reasonable and that payment was demanded within a reasonable time. It was certainly competent under this declaration to show the date the contract of extension was made and payment demanded and from this the court could determine if it was reasonable or otherwise.

delivered to said note to the plaintiff, and thereupon it is
afterwards becoming due to demand the payment of the
said note and the interest thereon mentioned, the plain-
tiff asked the court to order unless said note is paid he further
by the defendant, and thereupon in the plaintiff's
that the plaintiff at the request of the defendant
in demand immediate payment of the said note and the in-
terest thereon mentioned but would give further time
thereon to the said Bennett Brown Brick & Tile Company for
the payment thereof, the defendant by their separate en-
dorsement on said note then and there warranted the payment
of the said sum of money and promised the plaintiff to pay it
the same according to the tenor and effect of the said note
at the said Bennett Brown Brick & Tile Company should not
pay the same. And the plaintiff avers that thereupon it
containing in the said undertaking of the defendant, then
and there forebore in its demand for the immediate payment of
the said note and the interest thereon mentioned, and
then and there gave extended time to said Bennett Brown
Brick & Tile Company for the payment thereof; and although
the day of payment in the said note specified has elapsed,
and the payment of the said note having been demanded of the
said Bennett Brown Brick & Tile Company, it did not and would
not pay the same but refused so to do; whereof the defendant
on the day last aforesaid there had notice. Yet the defen-
dant have not paid to the plaintiff the amount of the said
note or any part thereof and refuse so to do; so the damage
of the plaintiff in the sum of \$1000.00, and thereupon it
prayer for
The plaintiff in error in the original brief con-
tended that it appeared from the return of the sheriff that

there was not proper service of process but after the writ of error was issued proceedings were had in the Circuit Court whereby the return of the Sheriff was amended so as to make the return regular, and this error was then abandoned and other errors assigned. The first of which is that any person who signs his name upon the back of a note under the present statute incurs liability of an endorser only and is not liable upon the note if payable on demand, as this note was, unless the note is presented to the maker for payment within a reasonable time after its issue and payment is refused, and unless notice of such dishonor is given to the endorser that the instrument is dishonored, and then contends that not one of these facts is alleged in the declaration.

It is true that the declaration does not allege the time that payment of the note was demanded but it does allege that payment of the note was demanded and refused and that plaintiff in error had notice on that very day of the refusal of the maker to make payment. It was not necessary that any definite time should have been fixed for the extension if it is understood that the debtor shall be and is indulged for a reasonable time. *Hornick v. Bedford*, 197 Ill. 540.

It appears from the record in this case that evidence was heard but there is no bill of exceptions preserving the evidence and we must presume that the time of the extension was shown to be reasonable and that payment was demanded within a reasonable time. It was certainly competent under this declaration to show the date the contract of extension was made and payment demanded and from this the court could determine if it was reasonable or otherwise.

It is next insisted that the declaration does not show any consideration for the extension and does not show any agreement to forbear the demand. We cannot agree with counsel in this view. The declaration alleges that defendant in error was desirous of demanding immediate payment of the note unless its payment was guaranteed and that defendant in error at the request of the plaintiff in error and his associates did postpone the demand of immediate payment and that the plaintiff in error did guarantee the payment of the note. We think this allegation sufficient and that it shows a valuable consideration for the extension. The effect of this is to show an agreement to forbear followed by an actual forbearance and this is a sufficient consideration. *McLicken et al vs. Safford*, 100 App. 192.

The fact that a negotiable instrument is described in the declaration and that it is therein alleged that the plaintiff in error became a party to the instrument imports a valuable consideration for the instrument and valuable to those becoming a party thereto. *Murds Revised Statute*, Chap. 96, Sec. 42.

It is next insisted by counsel for plaintiff in error that as the declaration alleges that the defendants by their separate indorsement guaranteed the payment of the note that this did not create a joint liability and that it was error to recover judgment against two of them. This declaration shows that the agreement was made with all of the endorsers and at their request, and while the word separately is used in describing them it doubtless refers to the fact that the endorsement was made by them in their individual capacity and not as a firm, but the declaration when taken as

It is now insisted that the declaration should show any consideration for the execution and does not show any agreement to forebear the demand. We cannot agree with counsel in this view. The declaration alleges that before the plaintiff was desirous of demanding payment he was told that the defendant was prepared to pay him the sum of \$100,000. It is the request of the plaintiff in error and his counsel that he should pay the demand of immediate payment and that the plaintiff in error did guarantee the payment of the note. We think this allegation sufficient and that it shows a promise to pay the sum of \$100,000. It is to show an agreement to forebear followed by an actual forbearance and this is a sufficient consideration. Mistaken of al. vs. Gellard, 100 App. 192.

It is also insisted that the fact that a negotiable instrument is described in the declaration and that it is therein alleged that the plaintiff in error became a party to the instrument imports a valuable consideration for the instrument and valuable to those becoming a party thereto. But the law is to the contrary. Chap. 90, sec. 46.

It is next insisted by counsel for plaintiff in error that as the declaration alleges that the defendant by their separate indorsement guaranteed the payment of the note that this did not create a joint liability and that it was error to recover judgment against two of them. This declaration shows that the agreement was made with all of the indorsers and at their request, and while the word separately is used in describing them it doubtless refers to the fact that the endorsement was made by them in their individual capacity and not as a firm, but the declaration when taken as

a whole shows that they were acting jointly in the undertaking and that under the law it was a joint and several contract. The statute upon negotiable instruments warrants the bringing of suits against any and all persons liable upon negotiable instruments in the same action. We can see no reason on this account for setting aside the judgment.

We are of the opinion that there is no merit in the errors assigned, other than the one relating to the service of process, which has been amended to show proper service, and the judgment of the lower court is ^{therefore} affirmed.

As the amendment of the return of process was made after the writ of error was issued herein it is ordered that each party pay one-half of the costs of this suit.

JUDGMENT AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this..... day of May
A. D. 1917

Charles C. Johnson
Clerk of the Appellate Court

OPINION

E. S.

4282

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

213 I.A. 694

~~ERROR TO,~~
APPEAL FROM

vs.

CITY COURT

No. 24

October Term, 1918.

COUNTY

TRIAL JUDGE

HON.

Term No. 23.

In the Appellate Court,
Fourth District.

Agenda No. 35

October Term A. D. 1913.

H. C. Gerke, Administrator of the
estate of James B. Reilly, deceased,
Appellant.

213 I.A. 694

vs.

The J. A. Ware Construction Company,
Appellee.

} Appeal from the City
Court of Alton,
Madison County.

McBride, J.

It appears from the record in this case that shortly prior to September 10, 1913, The J.A.Ware Construction Company entered into a contract with the Woodriver Drainage & Levee District to build and construct a drain or canal for said drainage district in Madison County, Illinois, and that on about the 10th of September 1913 the said J. A. Ware Construction Company sub-let the digging of this drain or canal to the firm of Ware & Reilly. Ware & Reilly then entered into the following agreement, "St. Louis, Mo., September 10, 1913. This is to certify that as The J. A. Ware Construction Company has sub-let to Ware & Reilly a firm composed of J. A. Ware and J. B. Reilly, all the work at Woodriver, Illinois, drainage district, which the said J. A. Ware Construction Company has a contract with said Woodriver Drainage District for completing, and said J. A. Ware and J. B. Reilly are to share in equal parts, that is one-half of the profits or one-half of the loss, if any". In pursuance of this contract Ware & Reilly entered upon the construction of said drain and completed it at some time prior to February 3, 1915. The exact date of completion is not shown. It further appears that on the 9th day of March

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2007-08-01

422 A. 1315

U. S. Census, Administrator of the
estate of James B. Kelly, deceased
Angel, et.

A. J. A. are construction company
- office

not shown. It further appears that on the 8th day of March prior to February 3, 1916. The exact date of completion of construction of said drain and completed it at some time in pursuance of this contract Wm & Kelly entered upon the one-half of the profits or one-half of the loss, if any". Wm and J. A. Kelly are to share in equal parts, that is Woodraver Drainage District for completing, and said J. A. J. A. Wm Construction Company has a contract with said at Woodraver, Illinois, drainage district, which the said a firm composed of J. A. Wm and J. A. Kelly, all the work Wm Construction Company has subject to have a Kelly September 10, 1913. This is to certify that on the J. A. entered into the following agreement, "Wt. Louis, Mo., canal to the firm of Wm & Kelly. Wm & Kelly then company was let the digging of this drain on that on about the 10th of September 1913 the said J. A. Wm for said drainage district in Madison County, Illinois, and Leave District to build and construct a drain or canal Company entered into a contract with the Woodraver Drainage ly prior to September 10, 1913, The J. A. Wm Construction It appears from the record in this case that about

J. B. Reilly lost his life in a fire which destroyed the building of the Missouri Athletic Club in St. Louis, Mo. That thereafter the Woodriver Drainage District made estimates and ascertained that there was due the J. A. Ware Construction Company \$2,596.69. J. B. Reilly left a will which was admitted to probate in the Probate Court of the City of St. Louis on April 9, 1914, and letters of administration with will annexed were issued to Wells E. Priest on the same day. On March 16, 1914, letters of administration were issued by the Probate Court of Madison County, Illinois, to Henry C. Gerke, Public Administrator, in the petition for which letters it was recited that Reilly died intestate. It further appears that under the laws of Missouri it was necessary that the surviving partner also take out letters of administration and give bond, which was done by J.A.Ware.

It further appears that the firm of Ware & Reilly owned wagons, plows, scrapers and other implements used in their business of the value of \$1,442.25. That shortly after the death of Reilly, J.A.Ware the surviving partner took possession of all of said implements; he being also the treasurer of The J.A.Ware Construction Company, and sought to collect the \$2,596.69 from the drainage district and Gerke Public Administrator protested against the payment of said money to said Company and protested against said J. A. Ware taking charge of and removing the said personal property. Owing to the protests that had been made the Woodriver Drainage & Levee District filed an interpleader in the Alton City Court of Alton, Illinois, on February 3, 1915, and The J. A. Ware Construction Company and Gerke, Public Administrator, were made parties to this bill. The J.A.Ware Construction Company answered admitting that the work was sub-

7. A. Kelly lost his life in a fire which occurred in
building of the Missouri Athletic Club in St. Louis, Mo.
That thereafter the Missouri Athletic Club made con-
siderable effort to ascertain that there was due the J. A. Kelly
which was admitted to probate in the Probate Court of the
City of St. Louis on April 9, 1914, and which of probate
estate with will annexed were filed to settle the estate on
the same day. On March 16, 1914, letters of administration
were issued by the Probate Court of East St. Louis, Illinois,
to Henry C. Gerk, Public Administrator, in the estate for
J. A. Kelly. It was recited that he had been intestate. It
further appears that under the laws of Missouri it was nec-
essary that the surviving spouse also take out letters of
administration and give bond, which was done by J. A. Kelly.
It further appears that the firm of Kelly
owned wagon, piano, furniture and other implements used in
their business of the value of \$1,462.28. That shortly after
the death of Kelly, J. A. Kelly the surviving partner took
possession of all of said implements; no being also the
treasurer of the J. A. Kelly Construction Company, and sought to
collect the \$2,000.00 from the drainage district and to use
said money to pay the debt against the payment of said
debt to said Company and protested against said J. A. Kelly
taking charge of and removing the said personal property.
Owing to the protests that had been made the Board of
Drainage & Sewer District filed an interference in the City
Court of Alton, Illinois, on February 8, 1915, and the
J. A. Kelly Construction Company and Gerk, Public Adminis-
trator, were made parties to this bill. The J. A. Kelly Con-
struction Company answered admitting that the work was done

let to Ware & Reilly, Co-partners of St. Louis; admits the death of Reilly and claims that it alone is entitled to the said funds. Gerke, Public Administrator, as aforesaid, answered admitting the contract between said Drainage District and the Ware Company but says it was understood and agreed between J.A.Ware and J.B.Reilly that said contract was to be taken in the name of said Company but for the mutual benefit of said individuals only, and claiming that one-half of the said fund and such portion of the other one-half as was necessary to compensate for the property taken possession of by J. A. Ware should be paid to him as such administrator out of said fund. On May 6, 1916, Gerke as such administrator, filed a cross-bill in said cause asking that the defendants Ware & Company and J. A. Ware be required to make an accounting; alleges that said contract was performed by the firm of Ware & Reilly and that the balance due as stated in said interpleader belongs to said firm; and alleging that J. A. Ware had been requested to account to Gerke for a share of the proceeds of said contract and that he had refused so to do. That said Ware & Company is a foreign corporation and out of the jurisdiction of this court. Also alleges that at the time of Reilly's death a large amount of personal property consisting of grading and camping outfit was located in Madison County and used in said work by said co-partners and that the same was removed from this state by J. A. Ware and is now in his possession, and that he has requested the return of said property by the said Ware and an accounting therefor but he has refused so to do, or to recognize the Probate Court of Madison County or its orders in any respect. That claims have been filed and allowed against the estate of said Reilly in Madison County, Illinois, but said

let to have a bill, the bill was not
 made at all, and it was not
 with T. A. Jones, Public Administrator, or otherwise,
 answered admitting the contract between said T. A. Jones and
 T. A. Jones and the Ware Company and says it was made and was
 agreed between T. A. Jones and T. A. Jones that said contract
 was to be taken in the name of said company but for the
 mutual benefit of said individuals only, and claiming that
 one-half of the said fund and such portion of the other one-
 half as was necessary to pay the same to the
 possession of T. A. Jones should be paid to him as their
 administrator out of said fund. On May 6, 1910, Jones as
 administrator, filed a cross-bill in said court asking
 that the defendants Ware & Company and T. A. Jones be required
 to make an accounting; alleging that said contract was not
 formed by the terms of Ware & Jones, and that the balance due
 as stated in said information belongs to said T. A. Jones and al-
 leging that T. A. Jones had been requested to account to Jones
 for a share of the proceeds of said contract and that he had
 refused so to do. That said Ware & Company is a London
 corporation and out of the jurisdiction of this court. 1910
 alleged that at the time of T. A. Jones' death a large amount of
 personal property consisting of trading and carrying outfit
 was located in Madison County and used in said work by said
 co-partners and that the same was removed from this state by
 T. A. Jones and is now in his possession, and that he has re-
 fused the return of said property by the said Jones and an
 accounting factor but he has refused so to do, or to recog-
 nize the probate court of Madison County as the court in any
 respect. That claims have been filed and allowed against the
 estate of said T. A. Jones in Madison County. T. A. Jones, but said

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administrator has no assets with which to pay said claims; then prays for an accounting and decree ordering the amount due Reilly's estate paid to Gerke. J.A. Ware was served by a copy of this cross-bill but made no answer to the cross bill and was defaulted. The Ware Company filed an answer to the cross-bill denying that Gerke was lawfully acting as such administrator, alleging that Reilly was a resident of St. Louis at the time of his death and denies that Gerke has any right or interest in said fund.

This cause was referred to the master in chancery to take the testimony and he made a report recommending that this fund be paid to the J. A. Ware Construction Company and that the cross-bill filed herein be dismissed. The court adopted the report of the master, dismissed the cross-bill and ordered the payment of said fund to the J. A. Ware Construction Company, and directed that the costs be paid out of this fund. Gerke as such administrator prosecutes this appeal and seeks to reverse the orders of the court.

The appellees complain that the court erred in requiring the costs to be paid out of this fund and assigns cross error as to that part of said order.

The appellant contends that inasmuch as this fund was due and owing from a resident of Illinois and that inasmuch as the personal property above set forth was in Illinois at the time of the death of Reilly and that thereafter debts were allowed by the Probate Court of Madison County, Illinois against said estate that appellant had the right to one-half of the fund above referred to and to the possession and control of the implements and camping outfit above mentioned. Appellant admits that this fund was payable to The Ware Construction Company but insists that as the

administrator had no assets with which to pay said claims.

then gave for an accounting and began ordering the assets

due Bell's estate paid to Gerie. J.A. was served by

a copy of this order but made no answer to the order

and was released. The Ware Company filed an answer

to the order and stated that it was not liable for the

debt of the estate of Bell and that it was not liable for

any part of interest on said debt.

At this time the cause was referred to the master in chancery

and the master reported that the Ware Company was not

liable for the debt of the estate of Bell and that it was

not liable for any part of interest on said debt.

and ordered the payment of said debt to the

administrator of the estate of Bell and that the

debt of the estate of Bell was to be paid out of

this fund. Gerie as such administrator presented this

order and asked to have the order of the court

revoked. The appellate court said that the court

was not to be bound by the order of the court

in this case as to that part of said order.

The appellate court said that it was not

bound by the order of the court in this case

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principal stock of the Ware Construction Company was owned by J. A. Ware and that as he was one of the persons who constructed the drain that the fund could and should be treated in equity as being payable to Ware and Reilly, partners, etc., and cites in support of this contention the case of Seymour vs. Woodstock Traction Co., 281 Ill., 84. We do not believe that this case is controlling in the instant case as there the stock holders and officers were the same in the corporation and the partnership. In this case Reilly owned no part of the stock of the corporation. And in that case they were not dealing with a surviving partner, which we think makes a material difference. We think the proof shows in this case that Reilly at the time of and prior to his death was a resident of the State of Missouri. It is true that where a resident of another state dies leaving property in this state letters of administration may be taken out in this state for the purpose of administering upon such property; and if this property had belonged to Reilly alone a different question would arise than the one appearing from this record. The statute does not provide, and we do not think is susceptible of the construction that an administrator may be appointed to take possession and control of partnership property. Our statute provides that in case of the death of one partner the surviving partners shall proceed to inventory the partnership estate, together with the liabilities of said partnership. Section 87, Chap. 3 of the Illinois Statutes provides that he shall also make a return of such inventory and liabilities together with an appraisement. If, however, the surviving partner happens to be a non-resident we do not understand that any one has the right to take the partnership property out of his possession. It is his duty

partnership property out of the possession. It is his duty
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however, the surviving partner has no right to take the
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corporation and the partnership. In this case Kelly owned
the time the stock holders and officers were the same as the
and before that time was in conformity with the law.

to settle the partnership business and after the same has been settled to pay over to the representatives of the deceased such part of the profits as he is entitled to receive. The surviving partner has a lien upon all of the partnership property for the purpose of having it apply in discharge of the debts of the firm, and also a lien upon the surplus assets to have them apply in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm. Lindley on Partnership, Vol. 2, Page 597. The surviving partner takes the exclusive legal title for the payment of the partnership debts and if any assets remain in his hands, after paying all liabilities, he should account for such to the administrator of the deceased. Miller vs. Jones, 39 Ill., 54.

The cross-bill in this case alleges that J.A. Ware refused to account to appellant, had failed to file an inventory in the Madison County Court, and had refused to submit himself to the jurisdiction of said court, and for these reasons the appellant had the right to take charge of the property. We do not believe that such facts could constitute a cause for appellant taking charge of this property. It is said by the Supreme Court of Illinois, "In case the surviving partner is guilty of laches or bad faith in closing up the concerns of the partnership, it is the duty of the administrator to file a bill in equity to enjoin him from disposing of the property, and receiving the outstanding debts, and have the effects of the partnership placed in the hands of a receiver for final adjustment and distribution". The People vs. White, et al, 11 Ill., 350. There is nothing in the cross-bill filed by appellant, or in the proof, that in our judgment would even warrant the court in taking charge

...the estate of the deceased partner, and the executor of the estate of the deceased partner is not to be held liable for the debts of the deceased partner, but only for the debts of the surviving partner. The surviving partner has a lien upon all of the partnership property for the amount of having it apply to the payment of the debts of the firm, and also a lien upon the surplus of the firm to have them apply in payment of what may be due to the partnership respectively after deducting what may be due from the firm as partners to the firm. Kindly on Partnership, Vol. 5, Page 337. The surviving partner takes the exclusive right to the payment of the partnership debts and is not liable to his hands, after paying all liabilities, he should account for each to the administrator of the deceased. Miller vs. Jones, 32 Ill., 24. The administrator is not liable for the debts of the deceased partner, but only for the debts of the surviving partner, and failed to file an inventory in the Madison County Court, and had refused to submit himself to the jurisdiction of said court, and for these reasons the appellant had the right to take charge of the property. We do not believe that such facts could constitute a cause for appellant taking charge of this property. It is said by the Supreme Court of Illinois, "in case the surviving partner is guilty of laches or bad faith in closing up the concerns of the partnership, it is the duty of the administrator to file a bill in equity to enjoin him from disposing of the property, and receiving the outstanding debts, and have the effects of the partnership placed in the hands of a receiver for final adjustment and distribution." The People vs. White, et al., 11 Ill., 32. There is nothing in the cross-bill filed by appellant, or in the proof, that in our judgment would even warrant the court in taking charge

of the property and appointing a receiver therefor and administering through a receiver, much less to turn the partnership property over to appellant. If the court ordered the partnership property to be turned over to the appellant then he would have the right to administer upon that property and dispose of it and use the proceeds thereof towards the payment of the individual debts of Reilly which had been allowed against his estate. This would be manifestly unjust for the surviving partner J. A. Ware, as individual creditors have a right only to seek payment of their debts out of the surplus of the partnership effects after the satisfaction of the partnership liabilities. *Wiel vs. Jaeger*, 73 App., 271; *Greene vs. Casey, et al*, 86 App., 523; *Wiel vs. Jaeger*, 174 Ill., 153.

We do not believe that the facts alleged in the cross-bill as shown by the evidence are sufficient to warrant the court in directing the interests of the deceased partner in this property to be turned over to appellant. The law does not authorize him to administer upon partnership property. The debt is payable by the Drainage District to the Ware Construction Company and no sufficient reason is shown why it should be diverted from payment in accordance with the terms of the contract. It does not appear from this record that the debts and liabilities of the partnership have been discharged or that there is any surplus or profits accruing from said partnership; and it further appears that J. A. Ware has given bond for the faithful performance of his duty to the Probate Court of St. Louis and that he is being controlled by said court in the settlement of the partnership matters, and we can see no reason why a court of chancery of this state should interpose and turn

this property over to the appellant, as is sought to do in this case.

The judgment of the lower court in dismissing the cross-bill and denying the right of appellant to this fund is sustained.

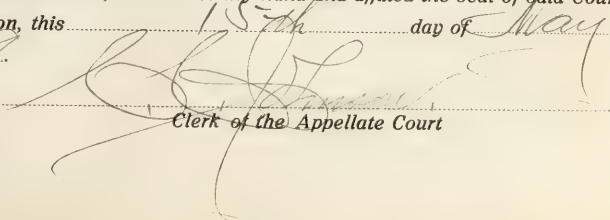
We think, however, the court erred in requiring all of the costs of this suit to be paid out of this fund and that the court should have required the appellant in due course of administration to pay all of the costs occasioned by the filing and hearing of the cross-bill, and the decree is accordingly modified so as to provide that appellant pay the cost occasioned by the filing and hearing on the cross bill all other costs to be paid as provided in said decree, and that the decree as modified be affirmed.

DECREE AFFIRMED AS MODIFIED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of May A. D. 1919.


Clerk of the Appellate Court

OPINION

EE. S.



Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit: On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

213 I.A. 694

~~ERROR TO~~
APPEAL FROM

B. G. Waggoner, Admr. of the estate
of Maye Wilton, deceased,
Appellee

vs.

Circuit COURT

No. 35
October Term, 1918.

Madison COUNTY

Alton, Granite & St. Louis Traction
Company, Appellant

TRIAL JUDGE

HON. LOUIS BERREUTER

Term No. 33.

In the Appellate Court.

Agenda No. 32

Fourth District.

October Term, A. D. 1918.

B. G. Waggoner, Administrator
of the Estate of
Maye Wilton, deceased,
Appellee.

vs.

Alton, Granite & St. Louis Traction
Company,
Appellant.

} 213 I.A. 694

} Appeal from the Circuit
Court of Madison County

McBride, J.

Maye Wilton, now deceased, recovered a judgment in the Circuit Court of Madison County against the appellant for seven thousand dollars, which judgment it is sought to reverse by this appeal. After the appeal was perfected, the death of the plaintiff below was suggested in this court and the cause proceeded in the name of B. G. Waggoner, administrator of the estate of Maye Wilton, deceased as appellee.

It appears from the record in this case that on December 1, 1916, appellant was operating an electric car line over a track which ran nearly north and south through the village of Woodriver and extended from East St. Louis to Alton, Illinois. This electric road was paralleled by two or three railroad tracks immediately adjacent to and east of it. All of these tracks were crossed at an angle by the Illinois Terminal track which also paralleled the tracks southerly for some distance from the crossing. An interlocking tower was placed east of all of the railroad tracks except the Illinois Terminal, derails were operated and signals displayed giving the movement of trains or cars over

October Term, A. D. 1918.

2131.A.694

County of Madison, Illinois

Wilton, Granite a Co., Lewis Traction
Company, Appellant.

Maye Wilton, now deceased, recovered a judgment in the Circuit Court of Madison County against the appellant for seven thousand dollars, which judgment it is sought to reverse by this appeal. After the appeal was perfected, the death of the plaintiff below was suggested in this court and the cause succeeded in the name of H. G. Waggoner, administrator of the estate of Maye Wilton, deceased as appellant.

It appears from the record in this case that on December 1, 1916, appellant was operating an electric car line over a track which ran nearly north and south through the village of Woodriver and extended from West Atlantic to Alton, Illinois. This electric road was paralleled by two or three railroad tracks immediately adjacent to and east of it. All of these tracks were crossed at an angle by the Illinois Terminal track which also paralleled the tracks southerly for some distance from the crossing. An interlocking tower was placed east of all of the railroad tracks except the Illinois Terminal, details were operated and signs displayed giving the movement of trains or cars over

the tracks, designed to avoid collisions. About two o'clock in the afternoon of December 1st a train consisting of two cars, called a limited train, was coming north on appellant's track. A pay car on the Illinois Terminal wished to cross over and the tower man set the brakes and signals to permit this, thereby opening a derail in appellant's track about five hundred feet south of the crossing.

It further appears from the evidence that the danger signal was displayed on appellant's track and the derail opened at a time when appellant's car was at a great distance below the derail and in time to have stopped the car before reaching the derail. The motorman did not observe the signal until within three or four hundred feet of the derail when it was too late to stop the car and avoid being ditched. He slowed down his car from the higher rate of speed at which it had been running, to about twenty or twenty-five miles per hour when he struck the derail and ran forty or fifty feet on the ties and the car in which appellee was riding was turned over on its side to an angle of about forty-five degrees when appellee and others were thrown from their places down on the floor of the car, at which time appellee claims she was struck in the back by a chair or some heavy object and received the injuries for which this suit was brought.

The evidence tends to show that she suffered very much as the result of this injury and expended a considerable amount of money in endeavoring to be cured. It also appears that the injury received was permanent unless it could be relieved by a surgical operation. It further appears from the evidence that appellee resided at Godfrey, Illinois, and that on the day before she had gone to East St. Louis on a business trip and had purchased a round trip ticket and at the time of

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much as the result of this injury and expended a considerable
amount of money in endeavoring to be cured. It also appears
that the injury received was permanent unless it could be re-
lieved by a surgical operation. It further appears from the
evidence that appellee resided at Godfrey, Illinois, and that
on the day before she had gone to East St. Louis on a business
trip and had purchased a round trip ticket and at the time of

her injury was returning home at the hour of about two o'clock in the afternoon of December 1, 1916. The evidence tends to show that the day was clear and that the signals could have been readily seen by the use of proper care. The appellant does not deny that it was negligent in the respect complained of but insists that its negligence was not the cause of the injury and that appellee was not injured to the extent complained of.

The declaration charges that it was the duty of defendant to use due care to carry the plaintiff with safety and without injury but that the defendant did not regard its duty in that behalf but so carelessly and negligently operated its said car as to cause said car to run off of the track and over-turn, or partially so, whereby the plaintiff then in the exercise of due care for her own safety was thrown with great force and violence from the seat in which she was riding to and upon the floor and injured.

There is no complaint by appellant as to the sufficiency of the declaration.

It appears from the evidence introduced by appellee that the danger signal was dropped by the operator at the crossing when the car in question was one thousand feet or more away from the derail, and that the motorman paid no attention to the signal and ran his car into an open derail and caused the car to leave the track turn over on its side to an angle of about forty-five degrees and by reason thereof appellee was injured. It is true that the motorman denies that the danger signal was dropped at the distance claimed from the crossing but insists that the car was within three hundred or four hundred feet before the signal was displayed and that he did not then have time to stop the car before reaching the derail.

her injury was returning home at the hour of about two o'clock in the afternoon of December 1, 1916. The evidence tends to show that the fog was clear and that the signals could have been readily seen as we use a proper care. The appeal does not deny that it was negligent in the respect of not insisting that its negligence was not the cause of the injury and that negligence was not required to the

extent complained of. The facts are changed that it was the duty of the defendant to use due care to keep the plaintiff with safety and that the defendant did not regard its duty in that behalf but so carelessly and negligently operated its car as to cause said car to run off of the track and strike or partially so, thereby the plaintiff then in the position of the car for her own safety was thrown with great force and violence from the seat in which she was riding to and upon the floor and injured.

There is no complaint by appellant as to the utility of the destination. It appears from the evidence introduced by appellant that the danger signal was dropped by the operator at the station when the car in question was one thousand feet or more away from the signal, and that the woman did not get to the signal and ran into it at an open detail and caused the car to leave the track run over on its side to an angle of about forty-five degrees and the woman thereon was injured. It is true that the woman claimed from the fact that signal was dropped at the distance claimed from the station but insists that she was within three hundred or four hundred feet before the signal was dropped and that he did not have time to stop the car before reaching the detail.

The evidence of appellee seems to preponderate upon this question and the negligence of the appellant is proven. Indeed, the appellant does not deny that the negligence of appellant is shown by the evidence but bases its claim for reversal, upon an erroneous instruction given for appellee upon the measure of damages. It is urged by appellant that this instruction is misleading in, that it does not confine the jury to the pecuniary loss suffered by plaintiff. As we read the instruction it does confine the jury to a fair compensation for the injuries sustained as shown by the evidence and alleged in the declaration. The jury could not have been misled by this instruction as appellant's tenth instruction advises the jury that plaintiff could be allowed only pecuniary loss or damage. This instruction seems to be a literal copy of an instruction approved by the Supreme Court in the case of Cicero Street Ry. Co. vs. Brown, 193 Ill., 274. We do not regard the criticism as well taken.

It is next urged that the court erred in sustaining an objection to a question put by counsel for appellant to appellee upon her cross-examination, wherein she was asked if she would be willing to permit a physician selected by appellant, and approved by the court, to examine her to determine the extent, nature and cause of her disability. To this counsel for appellee objected and the objection was sustained. It is claimed that in sustaining this objection in the presence of the jury it would be calculated to leave the impression upon the minds of the jury that appellant was acting improperly in asking the question; counsel knew before asking the question that appellee was not required under the law to submit to such an examination and knew that counsel for appellee were liable to object to such a question, and if

The evidence at the trial was in substance as follows:

On the question of the negligence of the appellant in not having the car repaired, the evidence was not very strong. Indeed, the appellant does not deny that the negligence was shown by the evidence but bases its defense upon the fact that the car was not repaired. It is urged by the appellant that this instruction is misleading in that it does not state that the jury to the contrary does not believe by a preponderance of the evidence that the negligence was shown by the evidence contained in the deposition. The jury could not have been misled by this instruction as appellant's tenth instruction advises the jury that plaintiff could be allowed only reasonable loss of damage. This instruction seems to be a literal copy of an instruction approved by the Supreme Court in the case of *Stevens v. Brown*, 188 Ill. 274.

It is not regarded the criticism as well taken.

It is next urged that the court erred in sustaining an objection to a question put by counsel for appellant to appellee upon her cross-examination, wherein she was asked if she would be willing to permit a physician selected by the appellant, and approved by the court, to examine her to determine the extent, nature and cause of her disability. To this counsel for appellee objected and the objection was sustained. It is claimed that in sustaining this objection in the presence of the jury it would be calculated to leave the impression upon the minds of the jury that a witness who acting improperly is asking the question; counsel knew before asking the question that appellee was not required under the law to submit to such an examination and knew that counsel was entitled to object to such a question; and it

appellant desired to make such an examination it should have ascertained privately as to her willingness or have excluded the jury until her wishes could have been ascertained, if he desired to avoid any bad effect from the refusal of such a question. There was nothing calculated to prejudice the appellant in the objection or refusal by the court to permit the question to be answered. The jury was instructed on behalf of appellant that the effect of this objection and the ruling of the court was a refusal by plaintiff to permit such an examination. In the case of the City of Chicago vs. McNally, 227 Ill., 20, it is said, "We have held in a great many cases that the plaintiff in an action of this kind cannot be required to submit to a physical examination as to his or her injuries". And cites in support of this the cases of, Perker vs. Enslow, 102 Ill., 272; Peoria, Decatur & Evansville Ry. Co., vs. Rice, 144 Ill., 227. This court is also committed to the same doctrine in the case of Cole vs. East St. Louis, 158 App., 501. We see no error in this ruling.

Shortly after the accident appellee's husband called upon appellant and advised it of the injury that his wife had received and thereupon the appellant sent Doctor Warden, a physician in its employ, to see appellee and after obtaining her permission made such an examination of her person as he desired to and obtained from her a statement as to her injury. After detailing his conversation with her he was asked by counsel for appellee, upon cross-examination, if he had not made a report to the company and recommended a settlement, which was objected to and the objection sustained.

Objection is also made to the refusal of the court to permit appellant to ask the witness, Mrs. Demond, as to appellee's physical condition in 1914 and 1915. The record

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shows that the objection was sustained to these questions because they were leading and suggestive and that the same matters were afterwards testified to by this witness.

Objection is also made to the question asked by counsel for appellee of Dr. Wright as to his compensation for attendance upon the trial. Appellee had the right to ascertain the doctor's compensation, if any, for the purpose of showing his interest, if any he had, in the suit.

An objection is also urged to the cross-examination of the motorman. We do not find any merit in any of these objections.

The principal complaint of appellant is as to the cause and extent of appellee's injuries and the amount of the judgment rendered. We regard this as the crucial question in this case, and not without its difficulties. Appellant contends that appellee suffered no substantial or material injury as the result of her fall from the derailing of the car. The testimony discloses that when the car turned upon its side that the appellee was violently thrown to the floor and across the car and that she was struck upon the back by a chair, suit case or some other heavy object. She testifies that she was taken with a severe pain in the back and that on the next morning she had a hemorrhagic discharge but that her menses were not due for about two weeks; that she has never been free from pain since the wreck; that the hemorrhage continued every two weeks all the next summer, that the flow or discharge was quite profuse and that in July, August and September following she was confined to her bed for about nine weeks and that upon every occasion of discharge she has been confined to her bed for two or three days. That she obtained medicine from Dr. LeGrand of East St. Louis and in about

three weeks began treatment with Dr. Beard of Godfrey and has been treated by him constantly since that time and that she has had consulting physicians in connection with Dr. Beard. That she has had a nurse much of the time and other help. That she has paid out and expended several hundred dollars in doctor bills and for nurses and other help. That during all of the time she has been in constant pain. She is corroborated in most of these statements by other witnesses. It further appears from her testimony, and that of other witnesses, that prior to this injury she was a strong healthy woman, was the mother of several children and able to do and did her own house work. It also appears that about one week before the wreck she was procuring some eye glasses and at the request of her optician she was examined by her physician, Dr. LeGrand, who says, "I made a complete physical examination of her on that occasion. I found her physical condition to be good at that time, that was about five days before the accident". Dr. Beard says that after the injury he treated her and that she had these hemorrhages two or three months almost continuously. Then she would average a week, two weeks, sometimes three or four days, off and on. That the character of the flow would be just like an ordinary menstrual flow only three or four times heavier than usual. He further says that he examined her but could not say what was the cause of her suffering; found that the womb was possibly twice as large as it ought to be and perfectly smooth, and tipped up a little but to one side; and says that the difficulties that he had described as to the derangement of the womb could have been caused by the wreck, her fall and some heavy object striking her in the small of the back. He is corroborated by other physicians that examined her.

...has had consulting physicians in connection with it. ...has been out of the time she has been in constant pain. ...is corroborated in most of these statements by other witnesses. ...witnesses, that prior to this injury she was a strong healthy woman, was the mother of several children and able to do and ...in her own house work. It also appears that about one week before the wreck she was procuring some eye glasses and at the request of her optician she was examined by her physician. Dr. J. Grand, who says, "I made a complete physical examination at her on that occasion. I found her physical condition to be good at that time, that was about five days before the accident". Dr. Grand says that after the injury he treated her and that she had three hemorrhages two or three months almost continuously. Then she would average a week, two weeks, sometimes three or four days, off and on. That the character of the pain would be just like an ordinary menstrual flow only three or four times heavier than usual. He further says that he examined her but could not say what was the cause of her suffering; found that the womb was possibly twice as large as it ought to be and perfectly smooth, and tipped up a little but to one side; and says that the difficulty that he had described as to the enlargement of the womb could have been caused by the wreck, her fall and some heavy object striking her in the small of the back. He is corroborated by other physicians that examined her.

The appellant sought to show that the injury complained of was not the result of the accident but may have been attributable to some other cause as testified to by Doctors Fiegenbaum, Taussig, Warden and Wright to whom a hypothetical question was propounded and answered by them. The question propounded and put to these doctors, in substance, contained the following facts, her age, size, birth of her children, the wreck, that she was caused to strike or fall from her chair and struck in the back with a chair or suit case; that she was helped from the car, rode home and the next morning suffered a hemorrhage from the vagina which occurred from time to time, confinement; that the womb early in 1917 had an internal depth of seven and a half to eight inches, that the walls of the uterus were hard and dense, uterus slightly tipped, all substantially as described by appellee's witnesses, except as hereinafter noted. To which question the doctors answered that the wreck could not have been the cause of the hemorrhage. They say that the uterus is so protected by the pelvis that it is not liable to be affected by a blow of this character. Some of them say that it might result from a menopause, the change of life, but the evidence tends to show that in change of life the uterus becomes smaller while in this case it became larger, and the evidence further tends to show that it was too early in life with appellee for menopause. They also say that it may have been a fibroid growth but the evidence of the physicians who examined her tends to show that no such growth was present in her case. These physicians were unable to give the cause of the excessive hemorrhage and pains. Doctor Taussig says, "The bleeding did not occur at once but occurred such as we often find after an unusual fright". Counsel for appellee

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criticise, and as we think justly so, the hypothetical question asked by appellant, in this, that it failed to incorporate the elements of a violent fall and immediate and continuous pain in the back suffered by the appellee. One of the physicians for appellant says, "If an accident that would cause any displacement it would be attended by pain at that time, and if there was any internal injury, by bleeding at that time and not later on; by that time I mean within twelve hours". It is evident that the questions of the violence of the blow and pain at that time were immediate factors.

We are unable to say that the verdict of the jury as to the cause and extent of the injury was manifestly against the weight of the evidence and are not disposed to disturb it on that account. While the judgment is large it must be borne in mind that the injuries suffered were also great and we have no right to disturb the amount of the verdict unless we can say that it is manifestly against the weight of the evidence as to the extent of the injury or was the result of passion or prejudice. It is the province of the jury to assess the amount of the damages sustained and its finding should not be lightly disturbed. *The North Chicago Street R. R. Co., vs. Zeiger*, 182 Ill., 9.

We are unable to say that the court committed any reversible error on the trial of the case or that the verdict is manifestly against the weight of the evidence, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED

Not to be reported in full.

existence, and as we think fairly so, the hypothetical
question asked by respondent, in this, that it related to an
examination of the elements of a violent act, and whether or not
such an examination is the duty of the jury, we are of opinion
that the answer is in the affirmative. It is the duty of the jury
to examine the evidence and to determine whether or not it
satisfies them that the defendant is guilty of the crime charged.
It is not the duty of the court to determine the facts of the case,
but to determine the law applicable to the facts as found by the jury.

the facts and again at that time were immediately before
the jury. We are unable to say that the jury was
in error in its verdict. It is the duty of the jury
to determine the facts of the case, and the court
to determine the law applicable to the facts as found by the jury.
We are unable to say that the jury was in error in its
verdict. It is the duty of the jury to determine the facts of the
case, and the court to determine the law applicable to the facts as
found by the jury. We are unable to say that the jury was in error
in its verdict. It is the duty of the jury to determine the facts of
the case, and the court to determine the law applicable to the facts
as found by the jury. We are unable to say that the jury was in error
in its verdict. It is the duty of the jury to determine the facts of
the case, and the court to determine the law applicable to the facts
as found by the jury.

Chicago Street & R. Co., vs. Karger, 182 Ill. 9.
We are unable to say that the court committed any
reversible error on the trial of the case or that the ver-
dict is manifestly against the weight of the evidence, and
the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED

not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of May A. D. 1912.

Charles C. Johnson,
Clerk of the Appellate Court

OPINION

EE. §

.....

730a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton

(appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit: On the twelfth day of April A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Alexander Decubber,

Appellee

vs.

No. 35

October Term, 1918.

Crab Orchard Coal Company,

Appellant

213 I.A. 694

ERROR TO
APPEAL FROM

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. D. T. HARTWELL

Term No. 35.

In the Appellate Court,

Agenda No. 14

Fourth District.

October Term A. D. 1918.

Alexander Decubber,
Appellee

vs.

Crab Orchard Coal Company,
Appellant.

213 I.A. 694

Appeal from the Circuit Court
of Williamson County.

McBride, J.

The appellee recovered a judgment in the Circuit Court of Williamson County for \$3800.00, which judgment appellant seeks to reverse by this appeal.

It appears from the evidence in this case that appellant's mine is situated about three-fourths of a mile south of Johnston City, in Williamson County, Illinois, and that the Chicago & Eastern Illinois Railroad extends from north of Johnston City south past appellant's mine and on the west side thereof. That there is a highway extending from appellant's mine along the east side of said railroad the distance of about one-fourth of a mile where it crosses the railroad at right angles and extends about forty feet west of the railroad, when it again turns north and passes into Johnston City along the west side of the railroad.

It further appears that on or about September 1, 1917, John Burnett, Jr., was driving an automobile for the defendant upon and along the highway above described and that about the time that he crossed the railroad at said crossing appellee came on to the highway west of the railroad and near where the highway turns north after crossing the

Term No. 50. In the Appellate Court, Fourth District. October Term A. D. 1915. Agents No. 14

2131.A.694

Appellate Court, Fourth District

W. J. ...

...

The appellee recovered a judgment in the Circuit Court of Williamson County for \$3500.00, which judgment was affirmed on review by this court.

It appears from the evidence in this case that appellant's mine is situated about three-fourths of a mile west of Johnston City, in Williamson County, Illinois, and that the Chicago & Eastern Illinois Railroad extends from east of Johnston City south past appellant's mine and on the west side thereof. That there is a highway extending from appellant's mine along the east side of said railroad the distance of about one-fourth of a mile where it crosses the railroad at right angles and extends about forty feet west of the railroad, when it again turns north and crosses into Johnston City along the west side of the railroad.

It further appears that on or about September 1, 1914, John Mumford, Jr., was driving an automobile for the defendant upon and along the highway above described and that about the time that he crossed the railroad at said crossing accident came on to the highway west of the railroad and near where the highway turns north after crossing the

railroad. The evidence of appellant tends to show that at about the time the automobile crossed the railroad Burnett the driver observed appellee in the highway traveling west and that he blew the horn and that appellee turned his head and saw the machine approach him. That at the time appellee saw the machine he was about twelve or fifteen feet west of it and that appellee then stepped to the left to allow the machine to pass upon the right but the driver of the automobile also turned the machine to the left and immediately thereafter the appellee stepped to the right and the driver then turned the machine to the right and then appellee stepped to the left and the driver turned the machine to the left and struck the plaintiff with the machine and injured him. During this time the driver set the brakes once or twice and slowed up the machine but did not stop. It further appears that the steps above taken by appellee and the turns made by the driver were at about the same time; the appellee endeavoring to get out of the way of the machine and the driver endeavoring to pass around him. The machine was being operated at a rate of speed from eight to twelve miles per hour, and the evidence shows the brakes were in good order and that the driver stopped the machine within a distance of two and one-half feet. The machine struck appellee and broke both bones of his leg just below the knee. The bones were badly crushed and because of their condition the physicians were unable to secure a perfect setting of the limb and by reason of this injury appellee appears by the evidence to have been permanently injured.

The declaration contained six counts, one original and five additional counts. The fifth additional count was dismissed out of the case at the close of plaintiff's evidence.

...evidence of mechanical tests a show that at
about the time the engine was started the
the driver observed signals in the highway showing west
and that he blew the horn and that signals turned his head
and saw the machine approach him. That at the time a signal
was the machine was about 100 feet or 150 feet west of
it and that signals then appeared in the left side of the high-
way to show that the right side of the driver of the auto-
mobile also turned the machine to the left and immediately
the signals stopped to the right and the driver
then turned the machine to the right and then signals
turned to the left and the driver turned the machine to the
left and struck the signal with the machine and injured
him. During this time the driver saw the other car or
truck in sight and the machine did not stop. It then
then appears that the signals were taken by signals and the
signals were at about the same time: the
signals endeavoring to get out of the way of the machine
and the driver endeavoring to turn around him. The machine
was being operated at a rate of speed from eight to twelve
miles per hour and the evidence shows the signals were in
good order and that the driver stopped the machine within
a distance of two and one-half feet. The machine struck
signals and broke both bones of his leg just below the
knee. The bones were badly crushed and because of their
condition the physician was unable to secure a perfect
setting of the leg and by reason of this injury signals
suggests by the evidence to have been permanently injured.
The doctor in testimony contained the words, "signals
and five additional counts. He then additional counts was
dismissed out of the case at the close of his testimony.

The first count was general and charged that the appellant by its said servant negligently and improperly drove and propelled said car. The first additional count charged that the automobile was operated at a dangerous and reckless rate of speed. The second additional count charges a failure to sound the horn upon the car or give any other warning of approach. The third count charged that the said servant recklessly and carelessly ran and operated said automobile outside of the well beaten path of the public highway and outside of the highway. The fourth additional count charged that the driver of the automobile did not exercise ordinary and reasonable care to keep a proper look-out ahead for persons in the public highway and along and on the same, including the plaintiff.

To this declaration the defendant filed the plea of general issue.

The appellant claims that the court erred in refusing to peremptorily instruct the jury to return a verdict in favor of the appellant.

While many other errors were assigned the questions urged by appellant were that there was no evidence to sustain the charge of negligence of appellant and the evidence showed that appellee was not in the exercise of due care for his own safety. That the verdict of the jury was excessive and that improper instructions were given for appellee and proper instructions refused appellant.

The real questions ~~raised~~ to which most of the argument has been devoted is as to the negligence of appellant and the want of due care of appellee.

Among other things it is insisted that the appellant cannot be found guilty of negligence because it claims that

[illegible]

the driver did all he could do to avoid the injury. It appears from the testimony of appellant's witnesses that the driver saw appellee in the highway at the distance of twelve or fifteen feet in front of the automobile. That appellee tried to get out of the way of the machine by first turning to the left and then apparently seeing the machine turn to the left he turned to the right and seeing that the machine also turned to the right he then again turned to the left and about this time the machine turned to the left and caught and injured him. The machine was not being driven at a very great rate of speed. The driver applied the brakes and checked the machine at two different times in this distance and was able to stop the machine within the distance of two and one-half feet but did not do so. He says, "He certainly saw me, I was not watching his eyes I was watching to see which way he stepped but he evidently saw me because he made a very great effort to get out of the way."

Again, the witness Burnett says, "On turning to the left his next to the last step he glanced at me thinking I was coming as I had turned but seeing that the distance between him was lessening and my chance of missing him was better if I turned to the right I did so. He became confused. I was about five feet from him then and he wheeled and put both hands upon my front fender placing his left foot forward the car running over his foot".

Again, the same witness says, "Could not say on which side I had the most room; noticed that I could clear my car quicker by turning to the right and more chance of saving him, except as I said he was on the left hand of the center of my car and there was more chance to clear him if I turned to the right".

the driver did all he could do to avoid the collision. It appears from the testimony of appellant's witnesses that the driver saw appellant in the highway at the distance of twelve or fifteen feet in front of the automobile. Appellee tried to get out of the way of the machine - first turning to the left and then immediately - the machine turned to the left and appellant was then again turned to the left and about this time the machine turned to the left and caught and injured him. The machine was not being driven at a very fast rate of speed. The driver applied the brakes and stopped the machine at two different times in this distance and was able to stop the machine within the distance of ten feet. He did not do so. He says, "I was not watching his eyes. I was watching his feet and he evidently saw me. I saw a very great effort to get out of the way." Again, the witness says, "I was watching his feet and he evidently saw me. I saw a very great effort to get out of the way." The last time he glanced at the turning I was coming as I had turned but seeing that the distance between him was increasing and my chance of striking him was better as I turned to the right I did so. He became nervous. I was about five feet from him then and he wheeled and put both hands upon the front fender facing the left foot forward the car remaining on his feet." Again, the same witness says, "I only saw him when side I had the most room; noticed that I could clear my car quicker by turning to the right and saw chance of striking him, except as I said he was on the left hand of the center of my car and there was some chance of clearing him if I turned to the right."

As we view it, Mr. Burnett, the driver of the machine, was able, if he had chosen to do so, to stop the machine within the distance of two or three feet. That he saw and knew in time to stop the machine that the appellee was confused and was trying to get out of the way and while the driver was trying to avoid striking the appellee he was attempting to do this without stopping his machine for he says that he could not see on which side he had the most room but that he cleared his car quicker by turning to the right and more chance of saving him. He knew and appreciated that there was danger of striking the appellee but notwithstanding that knowledge and notwithstanding his ability to stop the car, and knowing that appellee was confused, he continued on without stopping. If he had stopped his machine instead of taking a chance in passing him no injury could have happened to the appellee. When he saw the danger appellee was in he had no right to take any chance on injuring him. The appellant had no superior rights over appellee upon the highway. "The pedestrian has just as much right on the highway as the automobile and the driver of the automobile must pay attention to pedestrians who are on the highway, and if it assumes the taking the risk of a pedestrian who is crossing the highway getting out of its course and the pedestrian does not increase his speed after the blowing of the horn or any other signal but keeps on his speed it is the duty of the automobile to slacken his speed and take no risk of the pedestrian increasing his speed". *Diamonds vs. Cowlee*, 174 Federal, 571. "What happened was confusion of minds of the parties. Each was trying to avoid the other but each was getting in the way of the other

and as a result the collision took place. The negligence of the defendant consisted in his failure to recognize the great danger that would accrue to the plaintiff from the collision; he had no right, it seems to us, after he saw the confusion of minds which was taking place between him and the plaintiff to continue zigzagging in the street at the eminent hazard of colliding with the pedestrian. Greater care was incumbent upon him by reason of the deadliness of the machine he was propelling along the highway". *Hall vs. Kreutzer*, 134 Ky., 563. And in this case when the driver of the automobile saw the confusion and the danger of trying to pass around the appellee and had the ability to stop his machine, he should have done so at once. We are unable to say that the jury was not warranted in finding that the appellant was guilty of negligence in not doing so. Automobiles are powerful and dangerous machines and when driven upon the highway the greatest care should be exercised to see that no one is injured by them. The automobile driver has no right to assume that he has any greater right upon the highway than the pedestrian. Where the driver of an automobile has it in his power to check his machine and avoid injury to another he must do so. *Kessler vs. Washburn*, 157 App., 532; *Johnston vs. Coey*, 237 Ill., 86.

Again it is insisted that the appellee was not exercising due care for his own safety. It appears that appellee endeavored to get out of the way of the car. That he turned outside of the path of the car for that purpose and that when he saw that the car was liable to strike him after making that turn he turned again and again to avoid it and the driver of the automobile himself says, "That the appellee made quite an effort to get out of my way".

and to a certain extent the collision took place. The evidence
the defendant presented in his failure to recognize
great danger that would ensue to the plaintiff from the col-
lision; he was in right, it seems to me, after he saw the
confusion of minds which was taking place between him and
the plaintiff to the same extent as in the case of the
automobile of colliding with the defendant. Great
care was exercised upon him by reason of the condition of
the machine he was propelling along the highway. Well, he
travels, 135 N. 100. And in this case when the driver of
the automobile saw the confusion and the danger of col-
lision around the spot he had the ability to stop his
machine, he did not do so. He was unable to
say that the jury was not warranted in finding that the de-
fendant was guilty of negligence in not taking an automobile
and dangerous machine and when driven upon the
highway the greatest care should be exercised so as not to
one is injured by them. The automobile driver has no right
to assume that he has any greater right upon the highway than
the plaintiff. There the driver of an automobile has it in
his power to check his machine and avoid injury to another as
must be so. Kessler vs. Johnson, 107 N. 100; Johnson
vs. Coey, 107 N. 111, 88.
Again it is insisted that the driver of the car was
exercising due care for his own safety. It appears that ap-
pearances to get out of the way of the car. That he
was outside of the path of the car for that purpose and
that when he saw that the car was liable to strike him again
making that turn he turned again and again to avoid it and
the driver of the automobile himself says, "that the plaintiff
made quite an effort to get out of my way."

The questions of negligence and of due care were questions of fact for the jury to determine and under the evidence as appears from this record we are unable to say that the finding of the jury was manifestly against the weight of the evidence.

It is next insisted that the verdict of the jury is excessive. From an examination of this record we see nothing that is calculated to prejudice the minds of the jury against the appellant or to have excited any undue sympathy for the appellee or any cause why the verdict is excessive, and counsel in their argument have not attempted to point out any particular matter that was in any manner calculated to prejudice the jury in this case. The Supreme Court of this State has repeatedly held that unless something of this character is developed upon the trial that a court of review has no right to disturb the amount fixed by the jury, and we see no reason for disturbing it in this case. The appellee appears to have been badly injured and as the physicians state his injury is permanent. The fractured end of the bone is out of position and the bone seems to have been somewhat crushed and failed to knit properly, and it also appears that an infection had taken place and that the injury was serious.

It is next urged that the court erred in giving appellee's fifth instruction, which contains this clause, "If you further find from the greater weight of the evidence that at and immediately prior to the alleged injury to the plaintiff the said John Burnett, Jr., negligently and carelessly failed to keep a proper lookout ahead for the plaintiff as alleged and that by reason or on account of such negligence, if any the said Burnett ran against and over the plaintiff"

The question of negligence and of the cause and effect of the injury is for the jury to determine and under the evidence as appears from this record we are unable to say that the finding of the jury was manifestly against the weight of the evidence.

It is next insisted that the verdict of the jury is excessive. From an examination of this record we see nothing that is calculated to produce the minds of the jury which the plaintiff or his counsel could have induced sympathy for the negligence of any cause why the verdict is excessive, and cannot be in their argument have not attempted to point out any particular error that was in any manner calculated to produce the jury in this case. The Supreme Court of this State has repeatedly held that unless something of this character is developed upon the trial that a court of review has no right to disturb the amount fixed by the jury, and we see no reason for disturbing it in this case. The negligence appears to have been badly injured and as the physician states his injury is permanent. The fractured and of the bone in out of position and the bone seems to have been somewhat crushed and failed to knit properly, and it also appears that an infection had taken place and that the injury was serious. It is next urged that the court erred in giving appellant's fifth instruction, which contains this clause, "If you further find from the greater weight of the evidence that at and immediately prior to the alleged injury to the plaintiff the said John Burnett, Jr., negligently and carelessly failed to keep a proper lookout ahead for the plaintiff as alleged and that by reason or in account of such negligence it was the said Burnett Jr. who against and over the plaintiff."

and that at the time of and immediately before the alleged injury the plaintiff was in the exercise of ordinary care and caution for his own safety and that plaintiff was injured and damaged in consequence of the defendant's negligence, then you will find for the plaintiff. The criticism upon this instruction is that there is no evidence in the record upon which to base the instruction. The evidence clearly shows the acts of the parties prior to and at the time of the injury and from what we have heretofore stated, we are of opinion the question of negligence upon this proof was for the jury to determine and the evidence was sufficient in our judgment to form a basis for the instruction.

The appellee's sixth instruction tells the jury that if plaintiff in the exercise of due care was traveling along and upon the side of the public highway and outside of the main traveled road, and defendant's servants negligently and carelessly ran outside of the traveled way and injured plaintiff that he is entitled to recover. The criticisms upon this instruction are that there was no evidence upon which to base it and that there can be no recovery solely because a person may drive an automobile outside of the traveled way. As to the first criticism, the evidence of plaintiff tends to show that he was outside of the traveled way at the time he was struck. As to the other criticism the instruction does not direct a verdict because the automobile may have been traveling outside of the traveled highway but limits such to negligently and carelessly so traveling and injuring appellee while he was in the exercise of due care. We do not believe that the instruction is susceptible of the interpretation sought to be placed upon it by counsel.

...the plaintiff was in the exercise of ordinary care and
caution for his own safety and that of his family and
and damaged in consequence of the defendant's negligence.
then you will find for the plaintiff. The evidence upon
this instruction is that there is no evidence in the record
upon which to base the instruction. The evidence clearly
shows the fact of the plaintiff's injury to and at the time of
the injury was from that of the defendant's negligence, we are
in opinion the question of negligence was this proof was
for the jury to determine and the evidence was insufficient to
entitle them to base a verdict for the instruction.

The defendant's sixth instruction fails the jury
that it plaintiff in the exercise of due care was traveling
along and upon the side of the public highway and outside
of the main traveled road, and defendant's servant negligently
and carelessly ran outside of the traveled way and
against plaintiff which he is entitled to recover. The
evidence upon which to base it and that there can be no

recovery solely because a person may drive an automobile
outside of the traveled way. As to the third instruction,
the evidence of plaintiff tends to show that he was outside
of the traveled way at the time he was struck. As to the
other instruction the instruction does not direct a verdict
because the automobile may have been traveling outside of
the traveled highway but failed much so negligently and
consequently to traveling and injuring plaintiff while he was
in the exercise of due care. We do not believe that the
instruction is prejudicial to the instruction sought to
be placed upon it by counsel.

The criticism upon the seventh instruction is that as the plaintiff saw the automobile before he was struck the failure to sound the horn could not be the proximate cause of the injury as he had notice of its approach, and that it was error to instruct the jury that a failure to sound the horn could be a basis of recovery. It will be observed that before the plaintiff is entitled to recover under this instruction it must appear that a failure to sound the horn was the cause of the injury. While it appears from the evidence that appellee saw the car yet it was within twelve or fifteen feet of him when he first observed it. If the car was so close upon him at the time he noticed it as to cause the confusion of mind shown by the proofs to have possessed appellee, and to have also been communicated to appellant's servant driving the car, then it was for the jury to say whether or not the said confusion and the resultant injury would have been avoided by a sounding of the horn in reasonable time.

After a careful examination of this record we are unable to say that the verdict of the jury was manifestly against the weight of the evidence, or that the court committed any reversible error in its ruling, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

The criticism upon the seventh instruction is that as the plaintiff saw the automobile before he was struck the failure to sound the horn could not be the proximate cause of the injury as he had notice of its approach, and that it was common knowledge that the driver of an automobile should sound the horn when approaching a pedestrian. It will be observed that under the seventh instruction the jury was asked to determine if the defendant is liable for the injury. It is noted the horn was the cause of the injury. It appears from the evidence that appellee saw the car just as it was within twelve or fifteen feet of him when he first observed it. If the car was at that distance it is probable he noticed it as it came into view. The instruction to the jury is that the defendant is liable for the injury if he was negligent in not sounding the horn. It was for the jury to say whether or not the said conclusion and the resultant injury would have been avoided by a sounding of the horn in the case in the instant case. After a careful consideration of this record we are unable to say that the verdict of the jury was manifestly against the weight of the evidence, or that the court committed any reversible error in its ruling, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

THE COURT IN THIS CASE
HAS DECIDED THAT
THE JURY'S VERDICT
IS NOT TO BE REPORTED IN FULL.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of May
A. D. 1917*

Charles C. Johnson
Clerk of the Appellate Court

PINION

E.E. \$

(431a)

2131.A. 694

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

11
MAY 1919

1919

the first day of October,

and nine hundred and eighty

and for the Second District of the State of

and for the Second District of the State of

8, 1919, the opinion of the Court was filed in

of said Court, in the words and figures

Gen. No. 6526

213 I.A. 694

The People ~~vs.~~ Deft. in error.

vs

Error to Co. Ct. McHenry

Ben Silver, Pltff in error.

Dibell, P. J.

Ben Silver, hereinafter called the defendant, sued out this writ of error to review a judgment of the county court of McHenry County. Rule 16 of this court (137 Ill. App. 625) requires the party bringing a cause to this court to file a printed abstract of the record, which shall state in a concise form so much as may be necessary of the pleadings, interlocutory orders and judgment, as well as the evidence. Defendant filed an abstract of the testimony and set out therein the instructions. He did not abstract the common law record. That part of the abstract is only an index. It tells us that on certain pages we will find an information, an amendment thereto and another amendment, a verdict finding defendant guilty under the 50th, 51st, and 52nd. counts of the information, and that on a certain other page we will find the judgment. No part of the information is set out, and the abstract does not advise us of the nature of the charge. No part of the judgment is set out. True, the bill of exceptions recites the judgment, but that is only the certificate of the judge and is not a judgment. The bill of exceptions cannot be resorted to for an execution. Defendant claims that a motion he made to quash the information should have been sustained as to said 50th, 51st, and 52nd. counts, and his abstract does not set them out at all. We must hold that the failure to abstract them has waived that point. We are also of opinion that because of the defects in the abstract, we are not required to pass upon any questions presented. Our view of this abstract is

2181A.694

THE PEOPLE vs. JOHN SILVER, Defendant.

Error to Co. Ct. McHenry

vs

JOHN SILVER, Plaintiff in error.

Official, P. 1.

JOHN SILVER, hereinafter called the defendant, sued out this writ of error to review a judgment of the county court of McHenry County. Rule 18 of this court (137 Ill. App. 682) requires the party bringing a cause to this court to file a printed abstract of the record, which shall state in a concise form so much as may be necessary of the pleadings, introductory orders and judgment, as well as the evidence. Defendant filed an abstract of the testimony and set out therein the instructions. He did not abstract the common law theory. That part of the abstract is only an index. It tells us that on certain pages we will find an information, an amendment, there are another amendment, a verdict finding defendant guilty under the 10th, 11th, and 12th counts of the information, and that on a certain other page we will find the judgment. No part of the information is set out, and the abstract does not advise us of the nature of the charges. No part of the judgment is set out. True, the bill of exceptions recites the judgment, but that is only the certificate of the judge and is not a judgment. The bill of exceptions cannot be resorted to for an execution. Defendant claims that a motion he made to quash the information should have been sustained as he said 10th, 11th, and 12th counts, and his abstract does not set them out at all. We must hold that the failure to abstract them was waived that point. We are also of opinion that because of the defects in the abstract, we are not required to pass upon any questions presented. Our view of this abstract is

shown in *Martin & Co. v McMurray*, 74 Ill. App. 44, *Mayer v Schneider*, 113 Ill App. 628, and other cases. The view of such an abstract taken by the supreme court is shown in *Laird v Dickirson*, 241 Ill. 380, and other cases. However, defendant is so insistent that his rights have been sacrificed by the verdict and the judgment that we deem it proper to discuss the case somewhat further. The information contained one hundred counts, and defendant says that it went to the jury under eighty ~~and~~ nine of those counts, but which ones he does not tell us. We have examined some of them and find them to be under sections 6 and 6 $\frac{1}{2}$ of the Dram Shop Act. They charge in different counts that defendant unlawfully sold to or unlawfully procured or unlawfully aided in procuring intoxicating liquor for Stanley Schappel or William Sampkin, they each being persons who were in the habit of getting intoxicated. The three counts under which conviction was had charged certain unlawful sales to Sampkin on different dates.

Defendant's chief contention is that he so impeached Sam Kaplan, a witness for the People, that the jury should not have believed him, and that with his evidence rejected, sales to Sampkin are not proved. If the evidence introduced by defendant is believed, defendant did show that Kaplan had a grievance against defendant, and was acting under motives of revenge in seeking to have him prosecuted in this case, and unsuccessfully tried to bribe witnesses against defendant, and changed his own testimony on matters mostly immaterial. It does not follow that his own testimony was necessarily false. The jury believed him. The trial judge approved their finding. We are unable to say that the jury should have rejected his testimony. There was other testimony supporting the verdict. The People introduced in evidence the testimony of defendant at a previous trial of this ~~kind~~ or some other case.

at a previous trial of this kind or some other case. The People introduced in evidence the testimony of defendant's testimony. There was other testimony supporting the verdict. We are unable to say that the jury should have rejected his testimony. The jury believed him. The trial judge approved the finding. It is not for us to say that his own testimony was necessarily false. He changed his own testimony on matters mostly immaterial. and unnecessarily tried to bring witnesses against defendant. of revenge in seeking to have him prosecuted in this case, existence against defendant, and was acting under motives defendant is believed, defendant did show that Kaplan had a to Gamkin are not proved. If the evidence introduced by have believed him, and that with his evidence rejected, since Gam Kaplan, a witness for the People, that the jury should not Defendant's chief contention is that he so impressed

to Gamkin on different dates.

under which conviction was had charged certain unlawful sales the years in the habit of getting intoxicated. The three counts Stanley Schepel or William Gamkin, they each being persons used or unlawfully aided in procuring intoxicating liquor for counts that defendant unlawfully sold to or unlawfully procured. The three counts of the Drug Shop Act. They charge in different tell us. We have examined some of them and find them to be under eighty was nine of those counts, but which ones he does not counts, and defendant says that it went to the jury under case somewhat further. The information contained one hundred verdict and the judgment that we deem it proper to discuss the is no instant that his rights have been sacrificed by the v. Dickerson, 241 Ill. 380, and other cases. However, defendant such an abstract taken by the supreme court is shown in Laid v. Schaefer, 112 Ill. App. 638, and other cases. The view of

Defendant also testified in this case. His evidence is sufficient to make a case, except on one point. He proved that he kept in his house large quantities of whiskey, which he also called brandy, and large quantities of beer; that Schappel and Samphin were in his employ; that if they were at his table, the liquor was there for them to drink; that if they were not at his table, they knew where the liquor was kept and were welcome to drink from it at any time and that they did so drink. He testified that this was purely a gift. Other testimony introduced by the People showed that as to each of these employees, he had a slip of paper fastened to the wall, on which he charged against each man every drink he had and on each Saturday night deducted the charges from that man's pay. There was proof by several disinterested witnesses that Schappel and Samphin were in the habit of getting intoxicated and especially every Saturday night, and that Samphin went to church drunk and had to be removed. There was proof that this drinking was frequent and constant. Defendant was a junk dealer. The jury might well have doubted that defendant made a gift to his hired man of all the whiskey, brandy and beer they wished to drink, and may well have believed that he deducted it from their wages. He admitted having ordered a barrel of beer for one of his men and having let the man pay for it afterwards.

But defendant argues that the proof does not show that he kept a dram shop. According to defendant's own testimony, coupled with the proof that he deducted the cost of the drinks from the wages of his men, it was a dram shop as to his hired men, and we are of opinion the case does not come within the early decisions cited, where it was held that the Dram Shop Act does not apply to the case of a man giving a drink of liquor to a guest in his house.

Defendant also testified in this case. His evidence is sufficient.

Defendant also testified in this case. His evidence is sufficient. He proved that he kept in his house large quantities of whiskey, which he also called brandy, and large quantities of beer; that Sampkin were in his employ; that if they were at his table, the liquor was there for them to drink; that if they were not at his table, they knew where the liquor was kept and were welcome to drink from it at any time and that they did so. He testified that this was purely a gift. Other testimony introduced by the People showed that as to each of these employees, he had a slip of paper fastened to the wall, on which he charged against each man every drink he had and on each Saturday night deducted the charges from that man's pay. There was proof by several disinterested witnesses that Sampkin were in the habit of getting intoxicated and especially every Saturday night, and that Sampkin went to church drunk and had to be removed. There was proof that this drinking was frequent and constant. Defendant was a junk dealer. The jury might well have doubted that defendant made a gift to his hired men of all the whiskey, brandy and beer they wished to drink, and may well have believed that he deducted it from their wages. He admitted having ordered a barrel of beer for one of his men and having let the man pay for it afterwards.

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Defendant also testified in this case. His evidence is sufficient. He proved that he kept in his house large quantities of whiskey, which he also called brandy, and large quantities of beer; that Sampkin were in his employ; that if they were at his table, the liquor was there for them to drink; that if they were not at his table, they knew where the liquor was kept and were welcome to drink from it at any time and that they did so. He testified that this was purely a gift. Other testimony introduced by the People showed that as to each of these employees, he had a slip of paper fastened to the wall, on which he charged against each man every drink he had and on each Saturday night deducted the charges from that man's pay. There was proof by several disinterested witnesses that Sampkin were in the habit of getting intoxicated and especially every Saturday night, and that Sampkin went to church drunk and had to be removed. There was proof that this drinking was frequent and constant. Defendant was a junk dealer. The jury might well have doubted that defendant made a gift to his hired men of all the whiskey, brandy and beer they wished to drink, and may well have believed that he deducted it from their wages. He admitted having ordered a barrel of beer for one of his men and having let the man pay for it afterwards.

Defendant argues that this judgment cannot stand because he was previously convicted of the same offense. We find no evidence in the abstract of any such conviction. The evidence does show that there had been a previous trial of this or another case, but that trial may have ended in a disagreement of the jury for all that here appears.

Defendant contends that the judgment should be reversed because of the giving of the 4th. instruction for the people. Among other things, that instruction said that if defendant within a certain time limited sold to or procured or aiding in procuring intoxicating liquor for Schappel or Sampkin, and if they were then persons in the habit of getting intoxicated, the jury should find the defendant guilty. This instruction stated the law correctly, as far as it went, but it did not tell the jury under what counts there could be such a conviction. If defendant interprets this instruction to mean that the jury should find the defendant guilty under every count of the information, then it did not influence the jury, for they acquitted the defendant under eighty six counts. Instructions given for defendant very fully and carefully supplied the deficiencies in the fourth instruction for the People, and the jury could not have been misled.

Defendant complains of the rulings of the court upon the testimony. Where defendant was prevented from obtaining an answer to a question by such rulings, the form of the question was usually incorrect and he usually obtained the evidence later from the witness. The court was exceedingly patient with counsel for defendant and permitted him to introduce much evidence foreign to the case. Agnes Schappel was a witness for the People and called herself the wife of Stanley Schappel and Schappel testified that he was married to her fifteen years

...argues that this judgment cannot stand because he
was previously convicted of the same offense. We find no evidence
in the abstract of any such conviction. The evidence does show
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because of, he giving of the 4th instruction for the people.
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struction stated the law correctly, as far as it went, but
it did not tell the jury under what circumstances there could be such
a conviction. If defendant interprets this instruction to
mean that the jury should find the defendant guilty under
every count of the information, then it did not influence the
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an answer to a question by such rulings, the form of the question
was usually incorrect and he usually obtained the evidence
later from the witness. The court was exceedingly patient
with counsel for defendant and permitted him to introduce
much evidence foreign to the case. Agnes Schepel was a witness
for the people and called herself the wife of Stanley Schepel
and Schepel testified that he was married to her fifteen years

before in the old country. Very much of the time of the trial was taken in an effort by defendant to prove that a few years before this ~~trial~~ trial she was living with another man as his wife in a mining town in southern Illinois. This evidence was incompetent for impeachment, under Dimick v Downs 83 Ill. 570, and People v Goodrich, 251 Ill. 558.

The judgment is affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT.

SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

5-18

C. W. BILKIN
ST. BIRCH

1887

and Second District of the State of New York
do hereby certify that the foregoing is a true and correct copy of the original as the same appears from the records of the said District.

Attest:
Notary Public
for the State of New York

1887

6597
(4322)
213 I.A. 694

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. ✓ DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R-H. Denied Apr 9. 1919

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

6597.

10.

213 I.A. 694

Anton Paulack,
Plaintiff in Error,

-vs-

Error to Bureau.

Chicago, Ottawa & Peoria
Ry. Co.,
Defendant in Error.

Dibell, P. J.

Paulack owned a horse which was loose upon the streets in the night time in the city of Spring Valley in August, 1913. It was struck by an interurban car operated by the Chicago, Ottawa & Peoria Railway Company and was so badly injured that it was necessary to kill the animal. Paulack sued the railway company before a justice of the peace in Bureau county to recover for the loss of said horse. Defendant did not appear and plaintiff had a judgment for \$200. from which the company appealed. In the circuit court on a jury trial defendant had a verdict and a judgment thereon, and plaintiff prosecutes this writ of error to review said judgment.

Plaintiff introduced in evidence an ordinance of the city of Spring Valley, which made it unlawful for a railroad company to propel a car across a street within the limits of said city at a speed greater than ten miles per hour. He introduced proof tending to show that this car, at the time it struck the horse, and just before that, was running at a greater rate of speed than ten miles per hour. Defendant introduced evidence tending to show that the speed of the car was less than ten miles per hour at that time. Defendant introduced in evidence an ordinance of said city which forbade a person turning a horse loose in any street or to permit it to pass through any street without a driver. Paulack had testified

2131.A.694

Union Pacific, Plaintiff in Error.

Error to Bureau.

Chicago, Ottawa & Peoria, Defendant in Error.

Chicago, Ottawa & Peoria.

Union Pacific owned a horse which was loose upon the streets in the night time in the city of Spring Valley in August, 1913. It was struck by an interurban car operated by the Chicago, Ottawa & Peoria Railway Company and was so badly injured that it was necessary to kill the animal. Union Pacific sued the railway company before a justice of the peace in Bureau county to recover for the loss of said horse. Defendant did not appear and plaintiff had a judgment for \$100.00 from which the company appealed. In the circuit court a jury trial defendant had a verdict and a judgment thereon, and plaintiff prosecutes this writ of error to review said judgment.

Plaintiff introduced in evidence an ordinance of the city of Spring Valley, which made it unlawful for a railroad company to propel a car across a street within the limits of said city at a speed greater than ten miles per hour. He introduced proof tending to show that this car, at the time it struck the horse, and just before that, was running at a greater rate of speed than ten miles per hour. Defendant introduced evidence tending to show that the speed of the car was less than ten miles per hour at that time. Defendant introduced in evidence an ordinance of said city which forbade a person turning a horse loose in any street or to permit it to pass through any street without a driver. Plaintiff had testified

that at six o'clock that evening he left this animal in his barn with the barn door closed, and no one testified that he did not so leave it, and he argues that the introduction of this last named ordinance was therefore prejudicial error. Witnesses did testify that they saw this horse running loose in the street without any halter shortly before the accident. While plaintiff testified that at six o'clock that evening he left the horse shut up in a barn, it did not necessarily follow that the jury were bound to believe him. (Kennedy v. Modern Woodmen, 243 Ill. 560, on pages 568, 569, and cases there cited; Stephens v. Hoffman, 275 Ill. 497.) He was cross examined and gave testimony tending to throw doubt upon his veracity. It was for the jury to say whether they believed him, and their verdict implies that they did not. If they believed him, then this ordinance did not mislead them. We are of opinion that the court did not err in admitting said ordinance. It was competent in case the jury did not believe the testimony of plaintiff on that subject.

Three instructions given for defendant ended by saying that under the circumstances stated in that instruction, if they found them to be true, they should find the defendant not guilty. No fault is found with said instructions, except that the court should not so many times have directed them jury to find the defendant not guilty. We think this objection untenable. Complaint is made of the 7th instruction given for defendant, because it concludes that no presumption that defendant was negligent arises from the mere fact that the accident happened. We conclude the jury would understand that to mean "from the mere fact that the injury happened." It is argued that instruction No. 11, given for defendant, was erroneous

that at six o'clock that evening he left this animal in his barn with the barn door closed, and no one testified that he did not so leave it, and he argues that the introduction of this last named ordinance was therefore prejudicial error. Witnesses did testify that they saw this horse loose in the street without any matter shortly before the accident. While plaintiff testified that at six o'clock that evening he left the horse shut up in a barn, it did not necessarily follow that the jury were bound to believe him. (Kennedy v. Mahern Woodmen, 243 Ill. 580, on pages 588, 589, and cases there cited; Stephens v. Hoffman, 275 Ill. 497.) He was cross examined and gave testimony tending to throw doubt upon his veracity. It was for the jury to say whether they believed him, and their verdict implies that they did not. If they believed him, this ordinance did not mislead them. We are of opinion that the court did not err in admitting said ordinance. It was competent in case the jury did not believe the testimony of plaintiff on that subject.

These instructions given for defendant ended by saying that under the circumstances stated in that instruction, if they found them to be true, they should find the defendant not guilty. No issue is found with said instructions, except that the court should not as many times have directed the jury to find the defendant not guilty. We think this objection untenable. Complaint is made of the instruction given for defendant, because it concludes that no presumption that defendant was negligent arises from the fact that the accident happened. We conclude the jury would understand that to mean "from the mere fact that the injury happened." It is argued that instruction No. 11, given for plaintiff, was erroneous to pass through any

because it was not restricted to the issues material to the action. If that be a defect, at least three instructions requested by plaintiff and given, contain the same defect. Complaint is made that the court refused plaintiff's instruction No. 13. In the main it is the same as No. 3, given for plaintiff. It contained the additional element that it made no difference from which side evidence came, but that was the spirit of various given instructions, and we think the omission of that language was not erroneous. Plaintiff's instruction No. 14 was properly refused because it was argumentative. It was taken from language used by the supreme court in argument in an opinion. Plaintiff's refused instruction No. 15 stated the presumption of negligence raised by statute where a speed ordinance is violated, and then said if defendant claims it was not negligent the burden is upon it to prove that it was not negligent. Defendant denied that it violated the speed ordinance, but it had not claimed, so far as appears, that it was not negligent if it did violate the speed ordinance and if that violation caused the injury. That instruction sought to submit to the jury an issue not raised.

We deem it unnecessary to recite the evidence of the different witnesses, but think it sufficient to say that the questions whether this horse was running loose upon the street by the permission of the owner, and whether defendant was running its car at a speed greater than that permitted by ordinance, and whether the motorman could have stopped his car after he discovered the animal ahead of him or near the line of the street car, were questions of fact which must be considered as determined by the verdict of the jury, approved by the trial judge.

The judgment is therefore affirmed.

The judgment is therefore affirmed.

trial judge. considered as determined by the verdict of the jury, approved by the the line of the street car, were questions of fact which must be stopped his car. After he discovered the animal head of him or near them that permitted by ordinance, and whether the motorman could have the water, and whether defendant was running his car at a speed greater than that permitted by ordinance, and whether the motorman could have this horse was running loose upon the street by the permission of witnesses, but think it sufficient to say that the questions whether We deem it unnecessary to recite the evidence of the different not raised. The instruction sought to submit to the jury an issue it did violate the speed ordinance and if that violation caused negligent. Defendant denied that it violated the speed ordinance, it was not negligent the burden is upon it to prove that it was not a speed ordinance is violated, and then said it defendant claims No. 13 stated the presumption of negligence raised by statute where court in argument in an opinion. Plaintiff's refused instruction argumentative. It was taken from language used by the "supreme Plaintiff's instruction No. 14 was properly refused because it was and we think the omission of that language was not erroneous. evidence came, but that was the spirit of various given instructions additional element that it made no difference from which side it is the same as No. 3, given for Plaintiff. It contained the that the court refused Plaintiff's instruction No. 13. In the main Plaintiff and given, contain the same defect. Complaint is made If that be a defect, at least three instructions requested by because it was not restricted to the issues material to the action.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6605

(433a)

213 I.A. 695

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

6605.

213 I.A. 695

Joe W. Fox,
Appellee,

-vs-

Appeal from Boone.

James L. Pursley,
Appellant.

Dibell, P. J.

Fox sued Pursley before a justice of the peace on June 11, 1917, upon a promissory note. Defendant did not appear and plaintiff had judgment. Defendant filed an appeal bond before the justice, which was approved. On February 28, 1918, the cause was called for trial in the circuit court on said appeal and a jury was empaneled, and plaintiff introduced his evidence. The suit was upon a note dated June 17, 1915, payable six months after date, for \$132.64, with interest at seven per cent per annum, signed by Pursley and payable to his order, upon the back of which was his endorsement and the endorsement of T.N. Childs. Plaintiff introduced the note and proved the amount of the principal and interest then due, and rested. Defendant then called the cashier of a bank in Belvidere, by whom it was proved that the bank discounted this note for Childs before maturity for nearly the amount thereof, and that Childs was acting for the Peoria Life Insurance Company, and that the bank sold this note to Fox on December 4, 1916. Pursley was then sworn and testified that on the day of the date of the note Childs applied to him to write life insurance for him, and that he (Pursley) signed an application for life insurance in two places, one near the center and the other probably near the bottom of the paper. Pursley was then asked if he signed this note, and the court sustained an objection on the

2131A. 695

695.

Appeal from Boone.

Box 100.

-7-

James L. Pursey.

1911. 1. 1.

James L. Pursey before a Justice of the Peace on June 11, 1911, upon a promissory note. Defendant did not appear and Plaintiff had judgment. Defendant filed an appeal bond before the Justice, which was approved. On February 28, 1912, the cause was called for trial in the circuit court on said appeal and a jury was empaneled, and Plaintiff introduced his evidence. The note was upon a note dated June 17, 1911, payable six months after date, for \$132.64, with interest at seven per cent per annum, signed by Pursey and payable to his order, upon the back of which was his endorsement and the endorsement of T.M. Childs. Plaintiff introduced the note and proved the amount of the principal and interest then due, and rested. Defendant then called the cashier of a bank in Belvidere, by whom it was proved that the bank discounted this note for Childs before maturity for nearly the amount thereof, and that Childs was acting for the Florida Life Insurance Company, and that the bank sold this note to Fox on December 4, 1910. Pursey was then sworn and testified that on the day of the date of the note Childs applied to him to write life insurance for him, and that he (Pursey) signed an application for life insurance in two places, one near the center and the other probably near the bottom of the paper. Pursey was then asked if he signed this note, and the court sustained an objection on the

ground that the defendant had not denied the execution of the instrument under oath by an affidavit, as required by statute. It is conceded that that ruling was correct. Defendant's attorney then stated that he would like to have time to make an affidavit, and afterwards entered a motion for leave to file instantan an affidavit denying the execution of the note. The court denied the motion. Defendant then asked leave to withdraw a juror. The court denied the motion. Defendant then rested, and the court, at the instance of plaintiff, directed the jury to find for plaintiff for \$158.19, which was the amount of the computation testified to by a witness. Such a verdict was returned. Defendant moved for a new trial and filed an affidavit sworn to March 26, 1918, by defendant's attorney, stating that the court refused to give him leave to file instantan an affidavit denying the execution of the note and denied his application for leave to withdraw a juror.

That the court properly admitted the note in evidence and that it made a prima facie case for plaintiff is shown by many cases, among which is *Mewton V. Clark*, 235 Ill. 530. There are in Illinois a long line of cases wherein trial courts have been justified in refusing to permit material amendments to pleadings during the trial. It is claimed that the course the court pursued was an abuse of discretion, under *Defosse v. Kendall*, 283 Ill. 301. That case, however, recognizes the rule that to permit such additional defense to be made, not revealed till after plaintiff has closed his case, defendant must have been guilty of no culpable negligence in asking for such leave. Here the law was entirely clear that defendant could not be permitted to deny his signature to this note without first filing an

...that the defendant had not denied the execution of the instrument under oath by an affidavit, as required by statute. It is conceded that that ruling was correct. Defendant's attorney then stated that he would like to have time to make an affidavit, and afterwards entered a motion for leave to file an affidavit denying the execution of the note. The court denied the motion. Defendant then asked leave to withdraw a juror. The court denied the motion. Defendant then rested. The court, at the instance of plaintiff, directed the jury to find for plaintiff for \$58.19, which was the amount of the compensation testified to by a witness. Such a verdict was returned. Defendant moved for a new trial and filed an affidavit sworn to March 26, 1918, by defendant's attorney, stating that the court refused to give him leave to file an affidavit denying the execution of the note and denied his application for leave to withdraw a juror. This document was filed. That the court properly admitted the note in evidence and that it made a prima facie case for plaintiff is shown by many cases, among which is *Lewter v. Clark*, 235 Ill. 580. There are in Illinois a long line of cases wherein trial courts have been justified in refusing to permit material amendments to pleadings during the trial. It is claimed that the course the court pursued was an abuse of discretion, under *Belose v. Kendall*, 232 Ill. 301. That case, however, recognizes the rule that to permit such additional defense to be made, not revealed till after plaintiff has closed his case, defendant must have been guilty of no culpable negligence in asking for such leave. Here the law was entirely clear that defendant could not be permitted to deny his signature to this note without first filing an

affidavit to that effect. The note was dated in June, 1917, and was twice described in the transcript of the justice. Defendant filed his appeal bond with the justice and would naturally have some curiosity to know for what he had been sued and the transcript would have shown that. There is no denial but that defendant knew at that time that he was sued upon a note. His testimony as given makes it entirely probable that he did not intend to say that this signature was not in his handwriting, but that he was not conscious that he had placed that upon a note. This would have involved an investigation of all the circumstances attending his application for life insurance. The insurance company was at Peoria and there is nothing tending to show that Childs was in the vicinity of this trial. It is obvious that to permit the affidavit to be filed at that time would have compelled the plaintiff to ask for a continuance and thus lose a trial at that, the second term of the court since the appeal had been taken. The attorney for defendant in his affidavit for a new trial does not claim that he did not know the law on the subject, or the facts relied upon by his client, that only that he was so busy that he forgot to file an affidavit. The bill of exceptions shows that he asked leave to file such an affidavit instanter. If he had such an affidavit present, it should have been presented to the court and set out in the bill of exceptions. We may well assume that it was not presented because it was not sufficient in form and allegation. The motion for a new trial was heard about one month later. Defendant had ample time to prepare and present an affidavit denying that he signed this note. No such affidavit was made. The court has no means of knowing that he ever will

affidavit to that effect. The note was dated in June, 1917, and was twice described in the transcript of the Justice. Defendant filed his appeal bond with the Justice and would not have any curiosity to know for what he had been sued. The transcript would have shown that. There is no denial that defendant knew at that time that he was sued upon a note. His testimony as given makes it entirely probable that he did not intend to say that this signature was not in his handwriting, but that he was not conscious that he had placed it upon a note. This would have involved an investigation of all the circumstances attending his application for life insurance. The insurance company was at Peoria and there is nothing tending to show that Childs was in the vicinity of Peoria at that time. It is obvious that to permit the affidavit to stand it would have compelled the plaintiff to ask for a continuance and thus lose a trial at that time. The second term of the court since the appeal had been taken. The attorney for defendant in his affidavit for a new trial does not claim that he did not know the law on the subject, or the facts relied upon by his client, that only that he was so busy that he forgot to file an affidavit. The bill of exceptions shows that he asked leave to file such an affidavit instantly. If he had such an affidavit present, it should have been presented to the court and set out in the bill of exceptions. We may well assume that it was not presented because it was not sufficient in form and substance. The motion for a new trial was heard about one month later. Defendant had ample time to prepare an answer to the affidavit denying that he signed this note. No affidavit was made. The court has no means of knowing that he ever will

testify, denying that this is his signature. If the defense he really wished to interpose was fraud and circumvention in obtaining his signature, it is by no means certain that he would state such a condition of facts as would be admissible in this suit by a subsequent endorsee, where the original transfer of the note was in due course of business for value before maturity. It is worthy of note that while counsel proposed to file an affidavit denying the signature of the note, nothing was offered concerning the signature of the defendant as endorser, appearing upon the back of the note. While we are of opinion that if defendant had asked a short time to prepare such an affidavit for presentation, that might very properly have been accorded him, yet, upon the whole record, we are of opinion the judgment is right and should be affirmed.

The judgment is affirmed.

testify, denying that this is his signature. If the defense

is really minded to interpose was found and circumvention

in obtaining the signature, it is by no means certain that he

states such a condition of facts as would be admissible in this

with a view to a subsequent endorser, where the original transfer of the

note was in the course of business for value before maturity.

It is worthy of note that while counsel prepared the

affidavit denying the signature of the note, nothing was offered

concerning the signature of the defendant as endorser, appearing

upon the back of the note. While we are of opinion that it

is not necessary to prepare a short time to prepare an affidavit

for examination, that might very properly have been recorded

himself, upon the whole record, we are of opinion the judgment

is correct and should be affirmed.

The judgment is affirmed.

THE COURT: I have no objection.

IT WAS NOT

and violation.

month later.

an affidavit upon

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6618

(434a)

213 I.A. 695

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. ✓DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6618

213 I.A. 695

Charles Brett, appellee

vs

Appeal from Ogle.

John C. Babcock, appellant.

Dibell, P. J.

The abstract in this case does not comply with our rules. As to the common law record it is merely an index. It does not show who succeeded in the justice court, what the verdict of the jury was in the circuit court, who asked for a new trial, whom the circuit court judgment was against, nor who obtained an appeal to this court. It is a proper abstract only as to the bill of exceptions. We might properly refuse to consider the case because of this defect. We have, however turned to the record and find that it is a suit by Charles Brett against John C. Babcock, begun before a justice of the peace and tried there by a jury, who rendered a verdict in favor of plaintiff for \$50. that defendant appealed to the circuit court where the case was again tried by a jury and plaintiff again had a verdict for \$50; that a motion for a new trial by defendant was denied, plaintiff had judgment on the verdict and defendant appeals to this court. There were numerous rulings on evidence and instructions, but only two questions are argued. The cattle of defendant broke through a fence into plaintiff's corn field and did damage, considerably more than the amount of the verdict. The cattle got through a fence which it was plaintiff's duty to maintain. Plaintiff contends that he had such a fence as the statute requires and that certain of defendant's cattle were breachy and would break through or go over any ordinary fence and that the rest of defendant's cattle would follow. Defendant contends that the fence was

The abstract in this case does not comply with our rules. As to the common law record it is merely an index. It does not show who succeeded in the justice court, what the verdict of the jury was in the circuit court, who asked for a new trial, whom the circuit court judgment was against, nor who obtained an appeal to this court. It is a proper abstract only as to the bill of exceptions. We might properly refuse to consider the case because of this defect. We have, however, turned to the record and find that it is a suit by Charles Frost against John C. Babcock, begun before a justice of the peace and tried there by a jury, who rendered a verdict in favor of plaintiff for \$50. That defendant appealed to the circuit court where the case was again tried by a jury and plaintiff again had a verdict for \$50; that a motion for a new trial by defendant was denied, plaintiff had judgment on the verdict and defendant appeals to this court. There were numerous rulings on evidence and instructions, but only two questions are argued. The cattle of defendant broke through a fence into plaintiff's corn field and did damage, considerably more than the amount of the verdict. Then cattle got through a fence which it was plaintiff's duty to maintain. Plaintiff contends that he had such a fence as the statute requires and that certain of defendant's cattle were trespassing and would break through or go over any ordinary fence and that the rest of defendant's cattle would follow. Defendant contends that the fence was

not sufficient under the statute and that his cattle were not breachy, There was evidence tending to support each contention. Two juries have decided those contentions in favor of plaintiff. The trial judge has approved that finding. We cannot demonstrate that the last jury should have found the other way or that another jury ~~was~~ would so find. Defendant contends that the fence was not sufficient as against sheep and hogs, but the issue here involved cattle only and we think it unnecessary to discuss the evidence on that subject.

The judgment is affirmed.

[illegible]

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. } and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

1994, 1995, 1996

649 ~~Journal~~

Villars &

1201

6640

(435a)

213 I.A. 695

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. ✓ DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Minnie Hipkins,
Appellee,
-vs-
Carl A. Blomgren,
Appellant.

213 I.A. 695
Appeal from Rock Island.

Dibell, P.J.

Mrs. Minnie Hipkins, wife of a carpenter, lived with her husband and three children in a home on 35th Street in Rock Island. Carl A. Blomgren, a widower, a professor in Augustana Theological Seminary and a clergyman, lived in the next house north with two daughters. There was quite a space between the two houses and a fence was being erected on the line. An altercation arose between them in that open space and Mrs. Hipkins claims that Blomgren struck her over the head with a saw which he held in his hand, and that her head was cut by the teeth of the saw, and that her nervous system was seriously and permanently injured. She brought this action in trespass and filed the ordinary declaration for an assault and battery vi et armis. Blomgren filed a plea of not guilty, and a special plea which was not in justification, for it did not admit the striking. Replications were filed. The controversy occurred in September, 1914. The cause was tried in February, 1918. There was a verdict for plaintiff for \$1170, and a judgment thereon, from which defendant appeals.

Plaintiff's version of the event was that defendant approached her with the saw in his hand, as she stood in this open space, and that he said that he was going to kill her, and that

2131.A. 695

Appeal from Rock Island.

Minnie Hopkins,

vs-

Carl A. Blomgren,

Appellant.

Rock Island, Ill.

1918.

Mrs. Minnie Hopkins, wife of a carpenter, lived with her husband and three children in a home on 38th Street in Rock Island. Carl A. Blomgren, a widower, a professor in Augustana Theological Seminary and a clergyman, lived in the next house north with two daughters. There was quite a space between the two houses and a fence was being erected on the line. An altercation arose between them in that open space and Mrs. Hopkins claims that Blomgren struck her over the head with a saw which he held in his hand, and that her head was cut by the teeth of the saw, and that her nervous system was seriously and permanently injured. She brought this action in trespass and filed the ordinary declaration for an assault and battery vi et contra. Blomgren filed a plea of not guilty, and a special plea which was not in justification, for it did not admit the striking. Replications were filed. The controversy occurred in September, 1914. The case was tried in February, 1918. There was a verdict for plaintiff for \$110, and a judgment thereon, from which defendant appeals.

Plaintiff's version of the event was that defendant approached her with the saw in his hand, as she stood in this open space, and that he said that he was going to kill her, and that

he struck her three or four times over the head with this saw, and that the teeth of it cut her head. Defendant's account was that plaintiff was loudly abusing his daughters, or one of them, while the latter was talking with a young man in front of the house; that defendant went up to her and asked her to please be quiet and go into the house; that she set a neighbor's dog on him and the dog set his teeth in defendant's leg and hung on; that her little boy got a piece of board and pounded defendant on the shins; and that the result of the dog's teeth and the pounding on the shins was that defendant had to keep his leg bandaged for more than a year thereafter; that the defendant tried to guard himself from the dog and the boy with his left hand; that plaintiff came at him with her fists doubled and arms raised as if to attack him, and called him a hypocrite and various ~~an~~ profane and other epithets; that he threw up his right hand, in which he held the saw, to guard himself from her blows and that she hit him or his saw very hard and knocked the saw out of his hands; that he did not strike her or threaten to kill her. Plaintiff introduced evidence denying defendant's account of the transaction. The evidence was nearly evenly balanced. If anything, it appeared to preponderate in favor of the defendant. Plaintiff's injuries were proven only by herself. She did not call the physician to whom she went next day, nor account for his absence.

The court gave an instruction at the request of the plaintiff, authorizing exemplary damages under certain circumstances. Defendant contends that this instruction was erroneous, because the words "Wilful" or "wanton" were not in the declaration. The rule contended for is applicable to an action on the case for

he struck her three or four times over the head with this saw,
 and to the teeth of it on her head. Defendant's account was
 that Plaintiff was loudly abusing his daughters, or one of them,
 while the latter was talking with a young man in front of the
 house; that defendant went up to her and asked her to please be
 quiet and go into the house; that she set a neighbor's dog on him
 and the dog set his teeth in defendant's leg and hung on; that
 her little boy got a piece of board and pounded defendant on the
 sides; and that the result of the dog's teeth and the pounding
 on the sides was that defendant had to keep his leg bandaged
 for more than a year thereafter; that the defendant tried to guard
 himself from the dog and the boy with his left hand; that
 Plaintiff came at him with her fists doubled and arms raised as if
 to strike him, and called him a hypocrite and various other
 and other epithets; that he threw up his right hand, in which he
 held the saw, to ward himself from her blows and that she hit
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 The evidence was nearly evenly balanced. If anything, it appeared
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 were proven only by herself. She did not call the physician
 to whom she went next day, not account for his absence.

The court gave an instruction at the request of the
 plaintiff, authorizing exemplary damages under certain circumstances.
 Defendant contended that this instruction was erroneous, because
 the words "willful" or "wanton" were not in the declaration. The
 rule contended for is applicable to an action on the case for

negligence, but the words used in this ordinary form of a declaration in trespass for assault and battery imply malice. Malice is the gist of the action for assault and battery. In *Re Murphy*, 109 Ill.31; In *Re Mullin*, 118 Ill.551. In numerous such actions punitive damages have been held proper where malice or wanton recklessness or wilful disregard of the rights of the plaintiff appeared, and though in those cases the precise form of the declaration is not stated, there is no suggestion that those words, not in the customary forms, must appear in the declaration to authorize punitive damages. Among these cases are *Foot v. Nichols*, 41 Ill. 23 Ill.486; *Hawk v. Ridgeway*, 33 Ill. 473; *Donnelly v. Harfis*, 41 Ill. 126; *Brohn v. Brewer*, 77 Ill.280; and *Harrison v. Ely*, 120 Ill. 83. But although the state of the evidence required the court to give the instruction, we are of opinion that the evidence was so close, both on the matter of the propriety of allowing vindictive damages and on the question whether defendant was the aggressor, that the award of damages ought not to stand, but that those questions should be submitted to another jury.

The court sustained an objection to an offer by defendant to prove that from the middle of May until early in September, plaintiff had threatened defendant and his family and used abusive language and swear words to them, and that nearly a month before the present controversy plaintiff had set a large dog upon him and urged him on. We conclude the court ruled correctly, under *Murphy v. McGrath*, 79 Ill. 594; *Summins v. Crawford*, ^{supra} 80 Ill. 312; and *Forbes v. Snyder*, 94 Ill. 374. In *Cummins v. Crawford*, ^{supra}, such evidence was offered in mitigation of exemplary damages

negligence, but the words used in this ordinary form of a declaration in trespass for assault and battery imply malice. Malice is the gist of the action for assault and battery. In *Reilly*, 109 Ill. 31; in *Re Mallin*, 118 Ill. 551. In numerous cases actions punitive damages have been held proper where malice or wilful recklessness or wilful disregard of the rights of the plaintiff appeared, and though in those cases the precise form of the declaration is not stated, there is no suggestion that these words, not in the customary form, must appear in the declaration to authorize punitive damages. Among these cases are *Reilly v. Nichols*, 41 Ill. 486; *Hawk v. Ridgeway*, 38 Ill. 47; *Reilly v. Harris*, 41 Ill. 136; *Drown v. Brewer*, 77 Ill. 260; and *Marion v. Ely*, 130 Ill. 83. But although the state of the evidence required the court to give the instruction, we are of opinion that the evidence was close, both on the matter of the propriety of allowing vindictive damages and on the question whether defendant was the aggressor, that the award of damages ought not to stand, but that those questions should be submitted to another jury.

The court sustained an objection to an offer by defendant to prove that from the middle of May until early in September, plaintiff had threatened defendant and his family and used abusive language and swear words to them, and that nearly a month before the present controversy plaintiff had set a large dog upon him and urged him on. We conclude the court ruled correctly, under *Murphy v. Ogilvie*, 73 Ill. 394; *Gunnins v. Crawford*, 80 Ill. 312; and *Forbes v. Snyder*, 94 Ill. 374. In *Gunnins v. Crawford*, supra, such evidence was offered in mitigation of exemplary damages.

but the court held that it was not competent, and said: "Unless the threats which it is proposed to prove are so recent as to become a part of the transaction being investigated, such testimony is not admissible under any known rule of evidence for any purpose." The court would have found it necessary to permit plaintiff to deny or explain the previous events and would have been led thereby into the trial of immaterial issues. The former events were not a part of the alleged assault here being investigated. It would only have tended to show prior ill feeling between the parties. This could not have justified an assault. We hold the offer as made was properly rejected.

Defendant's complaint of the first instruction given for plaintiff cannot be considered, as it was not included in his written motion for a new trial. Plaintiff's third instruction was erroneous in two respects. It related to the measure of damages, and permitted plaintiff to recover such sum as the jury considered would be a fair compensation to plaintiff for her inability to work, if any, on account of such injuries. ~~But~~ Defendant contends that there was no proof of her inability to work. Plaintiff contends that there was such proof. Taking the latter view, there was no proof what her services were reasonably worth, and that was a matter susceptible of proof. This instruction permitted the jury to guess how much of the time following the injury she was unable to work, and also what the services of such a woman, situated as she was, were worth. The instruction also authorized her to recover all moneys she necessarily expended or became liable for for doctor's bills while being treated for her injuries. She

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circumstances which it is proposed to prove are so recent as to
be a part of the transaction being investigated, such testi-
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tends that there was such proof. Taking the latter view, there
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unable to work, and also what the services of such a woman
situated as she was, were worth. The instruction also authorized
her to recover all moneys she necessarily expended or became liable
for for doctor's bills while being treated for her injuries. She

testified that she did employ a doctor and had paid doctor's bills because of that injury, but did not state the amount of his charges, nor the extent of the services he rendered, nor what would be the reasonable and customary charge for such services. We disapproved of instructions allowing such a recovery under such evidence in *Moore v. A.E. & C.R.C. Co.*, 150 Ill.App. 484, and *Steeve v. Smith*, 153 Ill.App. 630. To the same effect is *Schmitt v. Kurrus*, 234 Ill. 578, and other cases. Plaintiff suggests that this instruction only allows what is claimed in the declaration, and that the declaration limited the claim for doctor's bills to \$25. and that this error could be cured by a remittitur of that amount. The instruction did not tell the jury that there was such a limit, and we do not know that they had the declaration before them in the jury room. Still, if that were the only error, perhaps it might be cured in that way.

Defendant complains of the refusal of six instructions requested by him. Without discussion we think it sufficient to say of the first five that they were clearly bad for various reasons. Refused instruction No. 6 rejects the number of witnesses testifying to a particular fact as an element to be considered. This instruction was held improper in *E.J. & E. Ry. Co. v. Lawlor*, 229 Ill. 621, but it was there said that it was not reversible error if the number of witnesses was not important. It has never been approved by a court of review in this state, so far as we are advised. It is never error to refuse it. The party offering it can very readily make it a good instruction by incorporating the number of witnesses as one of the elements to be considered.

For the reasons above stated the judgment is reversed and the cause remanded.

- 4 -

testified that she did employ a doctor and had said doctor's bills
because of that injury, but did not state the amount of his charges,
nor the extent of the services he rendered, nor what would be the
reasonable and customary charge for such services. We disapproved
of instructions allowing such a recovery under such evidence in
Horne v. J. & O.R.G. Co., 150 Ill.App. 434, and Steeve v. Smith,
152 Ill.App. 630. The same effect is Schmitt v. Murray, 234
Ill.App. 408, and other cases. Plaintiff suggests that this instruction
only allows what is claimed in the declaration, and that the de-
claration limited the claim for doctor's bills to \$25. and that this
error could be cured by a remittitur of that amount. The in-
struction did not tell the jury that there was such a limit,
and we do not know that they had the declaration before them in the
jury room. Still, if that were the only error, perhaps it might
be cured in that way.

Plaintiff complains of the refusal of six instructions
requested by him. Without discussion we think it sufficient to say
of the first five that they were clearly bad for various reasons.
Instruction No. 6 rejects the number of witnesses testifying
to a particular fact as an element to be considered. This in-
struction was held improper in J. & O.R.G. Co. v. Lawlor, 233 Ill.App.
but it was there said that it was not reversible error in the number
of witnesses was not important. It has never been approved up a
court of review in this state, so far as we are advised. It is
never error to refuse it. The jury offering it can very readily
make it a good instruction by incorporating the number of witnesses
as one of the elements to be considered.
For the reasons above stated the judgment is reversed and
the cause remanded.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

1872
JANUARY 1st
DISTRICT

Office of the State of Illinois, at Chicago
GENTRY, that the foregoing is a true copy of the original
filed cause of record in my office.
Is Testimony "I have" I her
son of the "Amelia's son"
day of
thousand nine hundred and

in
DO
in
I will this
- - -
in Lord one

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(436a)

213 I.A. 695

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

- Present--The Hon. ✓ DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.
-

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6641

A. J. Korzilius, appellee

213 I.A. 695

vs

Appeal from Will.

Fred Pistella, appellant

Dibell, P. J.

Korzilius appellee, sued Pistella, appellant herein, before a justice of the peace in the city of Joliet and, on a contested trial in which the same attorneys appeared as in this court, had a judgment for \$200 and costs on October 22, 1917. Appellant filed an appeal bond, which was approved on November 7, 1917, in the presence of the attorneys for each party, and on that date the justice lodged a transcript and other papers with the circuit clerk. The fee required to be paid to the clerk of the circuit court upon such appeal was \$5.00 and is required to be paid in advance by Section 14 of the Fees and Salary Act. Appellant did not pay said fees and the circuit clerk therefore did not file the papers. The November term of the circuit court convened on November 19th. so that these papers were lodged with the circuit clerk in time for the case to have gone upon the docket of said November term if appellant had paid the fee as required by law. The November term, 1917, and the January term, 1918, passed without said fee being paid. In the latter part of the March term appellee advanced the fee and had the case docketed and took a rule on appellant to refund said fee within five days. This was not done, and at the May term and after the expiration of said time the court dismissed the appeal and allowed a procedendo. Some days thereafter at said May term defendant moved to vacate the order of dismissal and to recall the procedendo. Thereafter said motion was heard and denied, and this is an appeal by defendant below from said order refusing to vacate the dismissal and recall the procedendo.

2131A.695

Gen. No. 2341

A. J. Kettling, appellee

Appeal from Will.

vs

Paul Pistella, appellant

Disall, P. J.

Verdina appellee, and Pistella, appellant herein,

before a Justice of the peace in the city of Joliet and, on a contested trial in which the same attorneys appeared as in this court, had a judgment for \$300 and costs on October 12, 1917. Appellant filed an appeal bond, which was approved on November 7, 1917, in the presence of the attorneys for each party, and on that date the Justice lodged a transcript and other papers with the circuit clerk. The fee required to be paid to the clerk of the circuit court upon such a bond was \$5.00 and is required to be paid in advance by Section 12 of the Fees and Salaries Act. Appellant did not pay said fees and the circuit clerk therefore did not file the papers. The November term of the circuit court convened on November 12th. It is that these papers were lodged with the circuit clerk in time for the case to have gone upon the docket of said November term if appellant had paid the fee as required by law. The November term, 1917, and the January term, 1918, passed without said fee being paid. In the latter part of the March term appellee advanced the fee and had the case docketed and took a trial on appellant's return said fee within five days. This was not done, and at the May term and after the expiration of said time the court dismissed the appeal and allowed a pro-cendo. Some days thereafter at said May term defendant moved to vacate the order of dismissal and to recall the proceedings. Thereafter said motion was heard and denied, and this is an appeal by defendant below from said order refusing to vacate the dismissal and recall the proceedings.

This record does not preserve for our review the questions argued. Recitals in the record, written by the clerk, and suggestions of counsel in the brief, that certain rulings were made on motions supported by affidavits, do not entitle parties to a decision by this court thereon. Such motions and rulings must be incorporated in a bill of exceptions and signed by the judge of the lower court before they become a part of the record. The clerk's statement of such matters in the record is no part of the record. They must be embodied in the bill of exceptions before they are reviewable here. *People v Ellsworth* 261 Ill. 375; *People ex rel v Cowen* 283 Ill. 308. This is also held in many other cases, and in some of them it is also held that the proof heard by the court upon the motion must be so preserved. There is a bill of exceptions in this record. It contains the motion of appellee to dismiss the appeal and the affidavit in support thereof and a notice by appellant's attorney to appellee that he would make a motion to vacate said order. It contains no motion to vacate the order. It contains an affidavit in support of a supposed motion to vacate the order and an affidavit against it. It does not show that these were all the proofs heard upon said motions, and does not show the decision of the court on either of them, and therefore does not comply with the foregoing rule. If the questions argued were before us it is clear that appellant was required to show two things; First: That he had acted with due diligence to protect his rights, in which respect the negligence of the attorney is imputed to his client; and second: that he had a meritorious defense. These affidavits show that appellee's attorney notified appellant and his attorney some six times that it was his duty to pay this clerk's fee and that if he did not do so, appellee's attorney

THIS COURT has not previously for our review the
proceedings. Records in the record, written by the
clerk, and suggestions of counsel on the order, that certain
things were made on motions supported by affidavits.
not entitled parties to a decision by this court thereon.
Each motion and ruling must be incorporated in a bill of
exceptions and filed with the lower court before
they become a part of the record. The court's statement
of such matters is the basis for the bill of exceptions.
They must be supported by affidavits in the lower court.
and reviewable here. The bill of exceptions is the basis
for the review. It is also held
cases, and in such cases motion must be so preserved.
There is a bill of exceptions in this record. It contains
the motion of appellee to dismiss the appeal and the affidavit
in support thereof and a notice by appellant's attorney to
appeal that he would make a motion to vacate said order.
The appellee has no motion to vacate the order. It contains an
affidavit in support of a supposed motion to vacate the order
and an affidavit against it. It does not show that these
were all the proofs heard upon said motions, and does not
show the decision of the court on either of them, and
therefore does not comply with the foregoing rule. It
the questions argued were before us it is clear that appellant
was required to show two things; First: That he had noted with
due diligence to protect his rights, in which respect the
negligence of the attorney is imputed to his client; and se-
cond: that he had a writ leave balance. These affidavits
show that appellee's attorney notified appellant and his
attorney some six times that it was his duty to pay this
clerk's fee and that if he did not do so, appellee's attorney

would pay them and take a rule on him to refund the money or have the appeal dismissed. In each instance appellee's attorney was told by appellant or by his attorney that appellant would not pay the costs. These refusals are not denied in the affidavit, and this proof is not overcome by appellant's statement in his affidavit that he had always been ready to pay the costs. These requests by appellee's attorney and refusals by appellant or his attorney extended over three terms of court. Appellant therefore showed no diligence. As to the merits, appellant's affidavit is merely a statement of conclusions without the facts. He stated that he made a contract with appellee by which for \$805 appellee agreed to make certain changes and do some building on appellant's house; that appellee did the work in part but not up to the standard called for by the contract, and that appellee also did some extra work for appellant, and that the work which he did was so insufficient that appellant was obliged to employ other contractors to erect and complete it, for which he paid \$117.86. He did not state what the contract was, so that the court could see what appellee was required to do. He did not state the condition of the work which he says was unsatisfactory, so that the court could see whether it did or did not fulfill the contract, and he did not state what extra work was done nor what work was done by the other contractors. In all matters material to the question whether appellant has a defense to the claim no facts are stated by which the court could ascertain whether he had such a defense, but only appellant's own conclusions. Therefore a meritorious defense was not stated.

The judgment is affirmed.

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... at have the appeal dismissed. In each instance appellee's
... attorney was told by appellant or by his attorney that
... appellant would not pay the costs. These refusals are
... not stated in the affidavit, and this proof is not overcome
... by appellant's statement in his affidavit that he had
... always been ready to pay the costs. These requests by
... appellee's attorney and refusals by appellant or his attorney
... extended over three terms of court. Appellant therefore
... no diligence. As to the matter, appellant's affidavit is merely
... a statement of conclusions without the facts. He stated that
... he made a contract with appellee by which for \$805 appellee
... agreed to make certain changes and to some building on appel-
... lant's house; that appellee did the work in part but not up
... to the standard called for by the contract, and that appellee
... also did some extra work for appellant, and that the work
... which he did was so insufficient that appellant was obliged
... to employ other contractors to erect and complete it, for
... which he paid \$117.88. He did not state what the contract
... was, so that the court could see what appellee was required
... to do. He did not state the condition of the work which
... he says was unsatisfactory, so that the court could see
... whether it did or did not fulfill the contract, and he did
... not state what extra work was done nor what work was done by
... the other contractors. In all matters material to the question
... whether appellant has a defense to the claim no facts are stated
... by which the court could ascertain whether he had such a
... defense, but only appellant's own conclusions.
... Therefore a writ of certiorari is granted and the case is reversed.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

(437a)

213 I.A. 695

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. ✓CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

1881-1882

AT A TERM OF THE APPELLATE COURT,

the first day of October,
nine hundred and eight-

Residing Justice

Justice

Justice

Y. Clerk

erwards, to-wit: on
of the Court was led in
of the Court, in the words and figures

Gen. No. 6587

Samuel Wetzell, ~~appellee~~

213 I.A. 695

vs

Error to City Court Sterling.

Frank Detweiler, ~~appellant~~

Carnes, J.

Samuel Wetzell held the promissory note of Frank Detweiler, and under a power of attorney annexed thereto procured a judgment to be entered thereof by confession in the city court of Sterling for \$549.86. Detweiler moved the court to vacate the judgment and permit him to plead to the declaration, which motion was denied, and he prosecutes this writ of error.

Though counter-affidavits on questions affecting the merits should not have been heard or considered (Moyses v Schendorf, 338 Ill. 232 ; Blake v State Bank of Freeport 178 Ill. 132; Gilchrist Trans Co. v North Grain Co. 204 Ill. 510; Kloepper v Osborne 137 Ill. App. 384; Murphy v Schoch, 135 Ill. App. 550; Dionne v Matzenbaugh, 49 Ill. App. 527) the motion was so heard, and it appeared without contradiction that Detweiler was endeavoring to adjust a business matter between himself and Wetzell in which Wetzell was indebted to him; that Wetzell said he had no property except a half interest in a tract of land in Texas; that he would convey that interest to him in adjustment of that deal if he would give him his note for \$500 and would try to dispose of the land within ninety days at a price that would net Detweiler \$1600; that the proposal was accepted and the note in question given for no other consideration, and Wetzell delivered to Detweiler a writing theretofore signed and acknowledged by himself and wife- in the form of an ordinary quit claim deed except that no grantee was named therein; that the paper had been drawn

2131.A.695

Error to City Court Sterling.

Samuel Wetzel

Frank Wetzel

vs

Frank Wetzel

Comes, J.

Samuel Wetzel held the promissory note of Frank Wetzel, and under a power of attorney annexed thereto procured a judgment to be entered thereof by confession in the city court of Sterling for \$549.88. Detweiler moved the court to vacate the judgment and permit him to plead to the declaration, which motion was denied, and he prosecutes this writ of error.

Though counter-affidavits on questions affecting the

verdict should not have been heard or considered (Moyses v

Sooner, 238 Ill. 323; Blake v State Bank of Freeport, 178

Ill. 183; Gilchrist v Trans Co. v North Grain Co. 304 Ill. 510;

Klopper v McDonough 187 Ill. App. 384; Murphy v McDonough, 135

Ill. App. 520; Dione v Matzenbach, 48 Ill. App. 527) the

motion was so heard, and it appeared without contradiction that

Detweiler was endeavoring to adjust a business matter between

himself and Wetzel in which Wetzel was indebted to him; that

Wetzel said he had no property except a half interest in a

tract of land in Texas; that he would convey that interest to

him in adjustment of that debt if he would give him his note

for \$500 and would try to dispose of the land within ninety

days at a price that would net Detweiler \$1800; that the

proposal was accepted and the note in question given for no

other consideration, and Wetzel delivered to Detweiler a

writing theretofore signed and acknowledged by himself and

wife in the form of an ordinary quit claim deed except that

no grantee was named therein; that the paper had been drawn

and executed in that way for convenience if a purchaser should be found. Detweiler, consented to the transaction in that form and probably both parties presumed it was valid. Wetzell failed to find a purchaser for the land. There is a controversy ~~xxxxxx~~ whether Wetzell positively agreed to find a purchaser or only to try to find one, and also whether at the time in question Wetzell had any interest in the land described in the deed.

The paper was not at common law a deed, and under the facts above stated was inoperative. If Wetzell had an interest in the land the writing did not convey it. (Chase v Palmer 29 Ill. 306, citing Second Blackstones Commentaries, page 338 Osby v Reynolds, 360 Ill. 576.) The defendant in error does not here claim that it did, and only attempts to argue that feature of the case by saying that it is common knowledge among attorneys that deeds are often so made and delivered, and that neither party knew that it made any difference, and Wetzell was guilty of no fraud in representing that such a writing would convey the title. We do not think the practice is usual or common in this state. The law has been too long settled to leave lawyers here ignorant of the effect of such an attempted conveyance. It may be true that in other jurisdictions it has to some extent prevailed. There is conflict in authority notes in Osby vs Reynolds, supra, as to the effect of such a conveyance. There is no effort in this record to show that it might be recognized in the state of Texas, and no suggestion in appellee's argument to that effect. In the absence of any showing of that kind, we cannot assume that the writing was effective under the laws of Texas. (Juillard & Co. v May 130 Ill. 87; Shannon v Wolf, 173 Ill. 253; Forsyth v Barnes, 238 Ill. 326.)

It therefore appears that there was no consideration

and executed in that way for convenience if a purchaser
be found. Wetzel, commented to the effect that in that form
and probably in the parties presumed it was valid. Wetzel failed
to make a purchase for the land. There is a controversy
whether whether Wetzel positively agreed to find a purchaser
or only to try to find one, and also whether at the time in
question Wetzel had any interest in the land described in the
title. The paper was not at common law a deed, and under the
note above stated was inoperative. If Wetzel had an interest
in the land the giving of it (O'Neal v Palmer
22 Ill. 308, citing Second Blackstone Commentaries, page 243
O'By v Reynolds, 220 Ill. 576.) The defendant in error does
not here claim that it did, and only attempts to argue that
lecture of the case by saying that it is common knowledge
among attorneys that deeds are often so made and delivered,
and that neither party knew that it made any difference, and
Wetzel was guilty of no fraud in representing that such a
writing would convey the title. We do not think the practice
is usual or common in this state. The law has been too long
settled to leave lawyers here ignorant of the effect of such
an attempted conveyance. It may be true that in other juris-
dictions it has to some extent prevailed. There is conflict
in authority also in O'By v Reynolds, supra, as to the
effect of such a conveyance. There is no effort in this
record to show that it might be recognized in the state of
Texas, and no suggestion in appellee's argument as to that effect.
In the absence of any showing of that kind, we cannot assume
that the writing was effective under the laws of Texas.
(Willard & Co. v May 130 Ill. 87; Shannon v Wolf, 173 Ill. 353;
Norvath v Barnes, 228 Ill. 328.)
It therefore appears that there was no conflict

supporting the promise to pay in the note; therefore, without considering other reasons suggested by counsel, we conclude the court erred in not granting the motion to open the judgment and permit the defendant to plead. On the trial the material facts can be determined. If Wetzell had title and under the laws of Texas the writing was effective to convey it, that can be shown.

It appears from an examination of the record that the judgment had been assigned by Wetzell to the First National Bank of Sterling. It seems to be assumed by counsel on both sides that this in no way affects the question here. We presume it does not. A judgment is not assignable. Only an equitable title can be transferred. The assignee is not a party to this proceeding. If there are equities to be adjusted they may be enforced in some other proceeding. (*Schmidt v Shafer* 198 Ill. 108; *Hossack v Underwood*, 55 Ill. 133.)

The court erred in not granting the motion and in not opening up the judgment and allowing the defense. The judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded.

and nothing is promised to pay in the future. The court
 has decided other reasons suggested. The court
 the court erred in not granting the motion to open the judg-
 ment and permit the defendant to plead. On the trial the
 material facts can be determined. If Watson had title and
 under the laws of Texas the writing was effective to convey
 it, that can be shown.
 It appears from an examination of the record that
 the judgment had been assigned by Watson to the First National
 Bank of Sterling. It seems to be assumed by counsel on both
 sides that this is a key to the question here. We
 presume it does not. A judgment is not assignable. Only an
 equitable title can be transferred. The assignee is not a
 party to this proceeding. If there are equities to be adjusted
 they may be enforced in some other proceeding. (Schmidt v. Shaffer
 122 Ill. 108; Hoesack v. Underwood, 55 Ill. 135.)
 The court erred in not granting the motion and in not
 opening up the judgment and allowing the defense. The
 judgment of the court below is therefore reversed and the
 cause remanded.

Reversed and remanded.

In the absence of any
 that the will
 (Julius & Co. v. I.
 Foxworth v. Brown, 122 Ill. 108)

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6508

438a

213 I.A. 696

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6596.

Agenda No. 9.

Joe Koritkowski, a minor, by
Marion Koritkowski, his next
friend,

213 I.A. 696

Appellee,

-vs-

Appeal from Rock Island.

Chicago, Milwaukee & St Paul
Railway Company, a corporation;
and Davenport, Rock Island and
Northwestern Railway Company,
a corporation,

Appellants.

Carnes, J.

Joe Koritkowski, the appellee, a boy then five days less than seven years old, lost his arm June 12, 1913, in the city of Moline at or near 16th street by coming in contact with a long, moving freight train passing west through that city. He, by his next friend, brought this action on the case against the two appellant railway companies. The controverted charges of negligence causing the injury are, (1) that the defendants carelessly and improperly managed the train; (2), that they were running the train within the city limits in excess of six miles an hour contrary to the provisions of a city ordinance; (3), that they were driving the locomotive up to and across 16th street in said city without ringing the bell, as required by the city ordinance; and (4), that in approaching and crossing 16th street they allowed huge volumes of dense vapor and steam to escape from the locomotive. There is no charge or claim of wilful and wanton negligence. None of the train crew knew of the accident until they were far distant from the city. Each defendant plead the general issue. There was a general verdict for the plaintiff of \$2500. on a jury trial in 1918, accompanied by a special finding in answer to an interrogatory submitted by the defendants that the plaintiff was not climbing or

2131.A.666

Joe Koritkowski, a minor, by
 Nathan Koritkowski, his next
 friend,

Appeal from Cook Island.

-7-

Chicago, Illinois & St. Paul
 Railway Company, a corporation;
 and Liverpool Dock Island
 and Northwestern Railway Company,
 a corporation,

Exhibit A.

Joe Koritkowski, the appellee, a boy then five years
 then seven years old, lost his arm June 18, 1918, in the city of
 Chicago at or near 16th street by coming in contact with a long,
 moving freight train passing west through that city. He, by his
 next friend, brought this action on the case against the two ap-
 pellee railway companies. The controverted charges of negli-
 gence causing the injury are (1) that the defendants carelessly
 and improperly managed the train; (2) that they were running the
 train within the city limits in excess of six miles an hour contrary
 to the provisions of a city ordinance; (3) that they were driving
 the locomotive up to and across 16th street in said city without
 ringing the bell, as required by the city ordinance; and (4) that
 in approaching and crossing 16th street they allowed huge volumes
 of dense vapor and steam to escape from the locomotive. There is
 no charge or claim of wilful and wanton negligence. None of the
 train crew knew of the accident until they were far distant from
 the city. Each defendant pleads the general issue. There was a
 general verdict for the plaintiff of \$2500. On a jury trial in 1919,
 accompanied by a special finding in answer to an interrogatory sub-
 mitted by the defendants that the plaintiff was not climbing or

attempting to climb on the moving train at the time of his injury. The court had, at the close of the evidence, refused to direct a verdict for the defendants. Their motion for a new trial was overruled, and judgment entered on the verdict, from which this appeal is prosecuted. We learn from reading the evidence that there had been a former trial, but the result is not disclosed in the record. We are asked to reverse the judgment solely on the ground that the verdict is manifestly against the weight of the evidence. The only error of law suggested is the refusal of the court to direct the verdict. No complaint is made of rulings on the evidence or instructions to the jury; and no question that both defendants are liable, if either is, or that the verdict is excessive if the plaintiff, under the evidence, was entitled to recover.

The controversy is entirely confined to the question whether the one or the other of the entirely contradictory statements of facts appearing in the evidence is entitled to credence. It appears without dispute that the railroad extends easterly and westerly, and is crossed at right angles by 16th street, and again one block west by 15th street; that the boy was injured by a long freight train passing west over those two streets; that he was picked up at or near 15th street after having been dragged some distance; that his arm was lacerated so as to require amputation, and he was otherwise bruised and injured. After this point the testimony of the respective parties is in direct conflict. The plaintiff testified that he was on 16th street north of the railroad right of way looking at the river, and walking backwards; that he heard no train approaching, but was enveloped in steam; that something on the engine or car caught in his clothing. He called

attempting to climb on the moving train at the time of the accident. The court had, at the close of the evidence, refused to grant a verdict for the defendants. Their motion for a new trial was overruled, and judgment entered on the verdict, from which this appeal is brought. The court in its opinion, after reading the evidence that there had been a former trial, but the result is not disclosed in the record. We are asked to reverse the judgment solely on the ground that the verdict is manifestly against the weight of the evidence. The only error of law suggested is the refusal of the court to direct the verdict. No complaint is made of rulings on the evidence or instructions to the jury; and no question that both defendants are liable, it either is, or that the verdict is excessive if the plaintiff, under the evidence, was entitled to recover.

The controversy is entirely confined to the question whether the one or the other of the entirely contradictory statements of fact appearing in the evidence is entitled to credence. It appears without dispute that the railroad extends easterly and westerly, and is crossed at right angles by 16th street, and again one block west by 16th street; that the boy was injured by a long freight train passing west over those two streets; that he was placed up at or near 16th street after having been dragged some distance; that his arm was lacerated so as to require amputation, and he was otherwise bruised and injured. After this point the testimony of the respective parties is in direct conflict. The plaintiff testified that he was on 16th street north of the railroad right of way looking at the river and walking backward; that he heard no train approaching, but was enveloped in steam; that something on the engine or car caught in his clothing. He called

an adult witness, who testified that he was at the time walking on the right of way east of 16th street; that he did not hear but did see a train approaching from the east going about twenty miles an hour; that he saw the boy on 16th street looking north to the river, and backing across the railroad tracks; that there was a big wind and steam and smoke, and something on a car, he thinks the front wheel, caught the boy, but he lost sight of him in the steam; saw him just before the engine reached him, and he did not see him again because of the steam and smoke until he was being dragged along the side of the track. It looked like his clothing was caught; that he was finally thrown out from the side of the car in 15th street; and another adult witness who said he was at the time walking on 16th street towards the river about one hundred feet from the engine when it passed the boy; that the boy was looking at the river and walking towards the track; that when the engine passed the steam, or front part of the engine knocked the boy down; that he was caught by the second or third car or something like that and dragged a little way, when some men came and picked him up; that he was caught by his arm or his clothes on his arm; that he saw the train coming when it was about one hundred yards from 16th street; the whistle was not blown and the bell did not ring, and the train was going about sixteen or seventeen miles an ^{hour} ~~hour~~ when it reached sixteenth street. Counsel do not deny that this evidence, if believed, makes a case for the plaintiff. It is therefore evident that the court did not err in refusing to direct a verdict for the defendants. But the defendants offered evidence that the train was approaching 16th street running less than six miles an hour with the engine bell ringing (it is not claimed that it rang automatically) and other evidence that the boy was not on 16th street

an adult witness, who testified that he was at the time walking on the right of way east of 16th street; that he did not hear but did see a train approaching from the east going about twenty miles an hour; that he saw the boy on 16th street looking north to the river, and looking across the railroad tracks; that there was a big wind and steam and smoke, and something on a car, he thinks the front wheel, caught the boy, but he lost sight of him in the steam; saw him just before the engine reached him, and he did not see him again because of the steam and smoke until he was being dragged along the side of the track. It looked like his clothing was caught; that he was finally thrown out from the car in 16th street; and another adult witness who said he was at the time walking on 16th street towards the river about one hundred feet from the engine when it passed the boy; that the boy was looking at the river and walking towards the track; that when the engine passed the steam or front part of the engine knocked the boy down; that he was caught by the second or third car or something like that and dragged a little way, when some men came and picked him up; that he was caught by his arm or his clothes on his arm; that he saw the train coming when it was about one hundred yards from 16th street; the whistle was not blown and the bell did not ring, and the train was going about sixteen or seventeen miles an hour when it reached sixteenth street. Counsel do not deny that this evidence, if believed, makes a case for the plaintiff. It is therefore evident that the court did not err in refusing to direct a verdict for the defendants. But the defendants offered evidence that the train was approaching 16th street running less than six miles an hour with the engine bell ringing (it is not claimed that it rang automatically) and other evidence that the boy was not on 16th street

but on the right of way between 16th and 15th street, where he attempted to jump on the moving train and in that way received his injury. They cite pertinent authority in support of their contention that under those assumed facts there was no liability. They argue that the plaintiff's evidence should not be believed because of the immature years of the boy; because his two witnesses are his same nationality, and there are some seeming inconsistencies in their statements, but mainly because a greater number of witnesses testified in support of the defendants' theory of the facts than of the plaintiff's. There is much force in their contention, and were we required or permitted to determine from a reading of the record what the conclusion of fact should be, we might incline to the defendants's view of the weight of the testimony. But the court in *Simmons v. Commonwealth Edison Co.*, 203 Ill. App. 367, well said that it is not the province of an appellate court to weigh the testimony except insofar as it is necessary in determining whether the verdict is contrary to the manifest weight of the evidence.

The testimony preserved in the bill of exceptions covers 490 pages of the record. It would unduly extend this opinion to enter into a careful analysis and discussion of what is there shown. A controlling question is whether the boy was a trespasser at the time of the injury. The jury in answer to the special interrogatory found that he was not attempting to climb or jump on the train, and the court at the instance of the defendants instructed them that if the plaintiff was on the defendants' right of way off from the street when he received the injury, he could not recover. They believed he was on the street. And while it is true that there was positive contradictory evidence that at first thought might seem to outweigh the plaintiff's evidence on that question, much can be said even

but on the right of way between 14th and 15th streets, where he attempted to jump on the moving train and in that he received his injury. They cite pertinent authority in support of their contention that under those assumed facts there was no liability. They argue that the plaintiff's evidence should not be believed because of the immature years of the boy; because his two witnesses are his same nationality, and there are some seeming inconsistencies in their statements, but mainly because a greater number of witnesses testified in support of the defendants' theory of the facts than of the plaintiff's. There is much force in their contention, and were we required or permitted to determine from a reading of the record what the conclusion of fact should be, we might incline to the defendants' view of the weight of the testimony. But the court in *Simmons v. Commonwealth Edison Co.*, 203 Ill. App. 367, will say that it is not the province of an appellate court to weigh the testimony except insofar as it is necessary in determining whether the verdict is contrary to the manifest weight of the evidence. The testimony preserved in the bill of exceptions covers 200 pages of the record. It would unduly extend this opinion to enter into a careful analysis and discussion of what is there shown. Controlling question is whether the boy was a trespasser at the time of the injury. The jury in answer to the special interrogatory found that he was not attempting to climb or jump on the train, and the court at the instance of the defendants instructed them that if the plaintiff was on the defendants' right of way off from the street when he received the injury, he could not recover. They believed he was on the street, and while it is true that there was positive contradictory evidence that at first thought might seem to outweigh the plaintiff's evidence on that question, much can be said even

from the reading of the record in support of the jury's finding. The boy, notwithstanding his immature years, very well knew whether he was crossing the street or playing on the right of way between the two streets at the time of the accident. He was taken to the hospital at the time of the injury, and if he ever made any other or different statements in the five years intervening between the injury and this trial it was not shown. If he was not on the street when injured there is no escape from the conclusion that he and his two witnesses above mentioned deliberately committed perjury. It is peculiarly a case for the application of the oft repeated statement in opinions of courts that great weight should be given the fact that the jury and the trial court saw the witnesses and heard them testify. There is almost as much reason for saying that the defendants's witnesses were guilty of deliberate perjury if the boy was on the street when he was caught by the train, though some room for suggestion that they might have been mistaken or might have forgotten. The situation called for an accurate judgment of the credibility of witnesses, and was one where a man that did not see and hear them would hesitate to put his opinion against that of another man that had that opportunity.

As to the speed of the train and whether the bell was ringing those questions are so often in dispute in trials of this kind that it would be a surprise to find an agreement in the evidence. In this case there was a preponderance in number of the witnesses testifying on those questions for the defendants. If the jury had found against the plaintiff on either or both, their conclusion should have been accepted by the court; but there was no such preponderance

the right of way between

from the finding of the record in support of the jury's finding.

The boy, notwithstanding his nine years, very well knew whether

he was crossing the street or playing on the right of way between

the two streets at the time of the accident. He was taken to the

hospital at the time of the injury, and if he ever made any other

or different statements in the five years intervening between the

injury and this trial it was not shown. If he was not on the street

when injured there is no escape from the conclusion that he and his

two witnesses above mentioned deliberately committed perjury. It

is peculiarly a case for the application of the oft repeated

statement in opinions of courts that great weight should be given

the fact that the jury and the trial court saw the witnesses and

heard their testimony. There is almost as much reason for saying that

the defendant's witnesses were guilty of deliberate perjury as the

boy was on the street when he was caught by the train, though some

room for suggestion that they might have been mistaken or might have

forgot. The same suggestion is equally applicable to the

credibility of witnesses, and was one where a man that did not see and

say they would hesitate to put his opinion against that of another

and that had that opportunity.

As to the speed of the train and whether the bell was ringing

these questions are so often in dispute in trials of this kind

that it would be a surprise to find an agreement in the evidence.

In this case there was a preponderance in number of the witnesses

testifying on those questions for the defendant. If the jury had

found against the plaintiff on either or both, their conclusion should

have been accepted by the court; but there was no such preponderance

the plaintiff's case.

for the defendants as to require the trial court to grant a new trial, or this court to reverse the judgment on that ground.

Under our view of the respective duties of the jury, the trial court and this court in passing on controverted facts expressed in *Schneeweisz v. Illinois Central R.Co.*, 196 Ill. App. 248, to which we adhere, the trial court did not err in refusing the defendants' motion for a new trial.

The court gave for the defendants fifteen instructions drawn with much ingenuity and calculated to impress the jury with a full sense of their duty to the defendants. Every controverted fact was clearly and fairly submitted. The jury are presumed from their varied acquaintance with men to be capable of intelligently passing on the credibility of witnesses. The trial court is not allowed to reject their conclusion merely because in his judgment it is not correct. We are not required or permitted to substitute our conclusions, reached by reading the record, for theirs, unless we are able to say not only that the verdict seems to us wrong, but also that it is manifestly against the weight of the evidence. We think on this record, entirely free from errors of law, we should accept the finding of the jury endorsed by the trial judge. The judgment is affirmed.

Affirmed.

for the defendants as to require the trial court to grant a new

trial, or this court to reverse the judgment on that ground.

Under our view of the respective duties of the jury, the trial

court and this court in passing on controverted facts as raised in

Schlesinger v. Illinois Central R. Co., 196 Ill. App. 248, to which we

adhere, the trial court did not err in finding the defendants

liable for a new trial.

The court gave for the defendants fifteen instructions

drawn with much ingenuity and calculated to impress the jury with

a full sense of their duty to the defendants. Every controverted

fact was clearly and fairly submitted. The jury are presumed from

their varied acquaintance with men to be capable of intelligently

passing on the credibility of witnesses. The trial court is not

allowed to reject their conclusion merely because in his judgment

it is not correct. We are not required or permitted to substitute

our conclusion, reached by reading the record, for theirs, unless

we are able to say not only that the verdict seems to us wrong,

but also that it is manifestly against the weight of the evidence.

We think on this record, entirely free from errors of law, we

should accept the finding of the jury endorsed by the trial judge.

The judgment is affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this_____
day of_____in the year of our Lord one
thousand nine hundred and_____

Clerk of the Appellate Court.

I, CHRISTOPHER G. LEE, Clerk of the Court in
 and County of the State of Illinois, do hereby certify that the foregoing is a true copy of the opinion of the
 Illinois Court in
 and with the
 In Testimony Whereof, I have
 signed of the said Appellate Court
 day of
 at
 thousand nine hundred and

6609

(439a)

2131.A. 696

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. ✓ CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE APPELLATE

... on Tuesday, the first day of October,
... of our Lord one thousand nine hundred and eight
... for the Second District of the State of

Hon. DORRANCE LEBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUTTY, Clerk.

DAVIS, Sheriff.

IT IS REMEMBERED, that afterwards, so with on
8, 1919, the opinion of the Court was filed in
Tr's office of said Court, in the words and figures

Gen. No. 6609

Giles S. Farmer, Trustee, &c.
et al. appellees.

213 I.A. 696

vs

Appeal from Lake.

Mary E. Fowler and Frank T.
Fowler. appellants.

Carnes, J.

This case is between the same parties as Gen. No. 6608 and involves the same questions. The records are the same except that the loan was in this case \$3700 instead of \$3500 the land conveyed not the same, and the solicitor's fee allowed was \$400 instead of \$350. In all matters touching the questions presented for review, except this difference of amount in solicitor's fees, the records are literally the same. They were made up on different days, but for the most part are identical copies. The briefs and abstracts are, for the most part, literally the same.

For the reasons stated in the former case the decree is affirmed.

Affirmed.

Dibell, P. J. I dissent for the reasons stated by me in Gen. No. 6608.

Gen. No. 6808

Clare E. Turner, Trustee, &c.

et al.

2131.A.686

Appeal from Lake.

vs

Mary E. Turner and Frank T.

Turner.

Case, 1.

This case is referred to the same parties as Gen. No. 6808.

and involve the same questions. The records are the same except that the loan was in this case \$2700 instead of \$2500 and the land conveyed not the same, and the solicitor's fee allowed was \$400 instead of \$350. In all matters touching the questions presented for review, except this difference of amount in solicitor's fees, the records are literally the same. They were made up on different days, but for the most part are identical copies. The briefs and abstracts are, for the most part, literally the same.

For the reasons stated in the former case the decree is

affirmed.

Affirmed.

Dibell, P. J. I dissent for the reasons stated by me in Gen.

No. 6808.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

thousand and hundred and...
day of _____ in the year of our Lord one
and of the _____ Appellate Court in _____
In Testimony Whereof, I hereunto set my hand and affix the
CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
entitled cause, of record in my office
I, _____ Secretary of the State of Illinois, and keeper of the Records and Seal thereof, DO
Attest: _____
_____ Secretary of the State of Illinois, and keeper of the Records and Seal thereof, DO

6615

(440a)
213 I. A. 696

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6615.

Roy E. Keye, a minor by his next
friend Edward Keye, appellee

213 I.A. 696

vs

Appeal from Peoria.

James D. Roszell, doing business
under the name of Roszell Ice
Cream Company. appellant.

Varnes, J.

Roy E. Keye, a boy about ten years old, was with two other boys playing on or near a public street in the city of Peoria. A large, heavily loaded power ~~truck~~ driven truck belonging to James D. Roszell, the appellant, operated by one of his employees, stopped in the street to deliver ice cream and take on empty containers. While so stopping, and while the driver and his helper were away from the truck, the three boys climbed on, Roy at the side, the two other boys at the rear. After the truck started Roy in getting off attempted to reach the iron step with his bare foot, missed it, got his foot into a moving driving chain, and was injured. He, by his father as his next friend, brought this action, charging wilful and wanton conduct of the driver as the cause of the injury, and had a judgment on a verdict for \$2000., from which the defendant appeals. The case was tried on what is termed the fifth amended declaration which charges only wilful and wanton conduct. We do not understand appellee to claim that appellant owed Roy any duty not to wilfully injure him. It is therefore unnecessary to discuss Illinois cases cited by appellant holding that under similar circumstances the owner of the vehicle was not liable for the mere negligent conduct of his driver. There is no doubt that Roy was a trespasser on appellant's property/

2131.A. 698

Roy E. Keye, a minor by his next
friend Edward Keye, appellee

Appeal from Province.

vs

James D. Roswell, doing business

under the name of Roswell Ice

Cream Company, appellant.

Vernee, J.

Roy E. Keye, a boy about ten years old, was with two other boys playing on or near a public street in the city of Pacific. A large, heavily loaded power driven truck belonging to James D. Roswell, the appellant, operated by one of his employees, stopped in the street to deliver ice cream and take on empty containers. While so stopping, and while the driver and his helper were away from the truck, the three boys, standing on, Roy at the side, the two other boys at the rear. After the truck started Roy in getting off attempted to reach the iron step with his bare foot, missed it, got his foot into a moving driving chain, and was injured. He, by his father as his next friend, brought this action, charging willful and wanton conduct of the driver as the cause of the injury, and had a judgment on a verdict for \$2000., from which the defendant appeals. The case was tried on what is termed the fifth amended declaration which charges only willful and wanton conduct. We do not understand appellee to claim that appellant owed Roy any duty not to willfully injure him. It is therefore unnecessary to discuss Illinois cases cited by appellant holding that under similar circumstances the owner of the vehicle was not liable for the mere negligent conduct of his driver. There is no doubt that Roy was a trespasser on appel-

lant's property

Roy testified to the injury as above stated; also that he thought the driver saw him on the truck before it started and said nothing to him until he had started and was running at a speed of fifteen to twenty miles an hour when he suddenly told him to get off, waving his arms and frightening him so that in his attempt he missed the step. One of the other boys testified that he could not from the rear of the truck see the driver, but heard him say "get off the truck" when they were running fifteen to twenty miles an hour. The driver testified that he did not see the boys at all and did not know they were on the truck or that anything had happened until some cry of a bystander warned him that someone was hurt. that he then stopped, went back and inquired of the boy about the injury, and was told that he was trying to get on while the truck was in motion, and missed the step, and got his foot in the chain. These were all the witnesses called as to the manner of the accident. The helper was a transient that only worked for appellant that day, and his whereabouts were unknown at the time of the trial. The other of the three boys was not available as a witness.

Appellants main contention is that the evidence does not warrant a verdict for the plaintiff; and in answering that question we disregard the evidence of the driver as to where Roy got on the truck and assume that he got off on and off as he says he did. We are inclined to the opinion that the jury might be warranted in finding wilful and wanton conduct of the driver if the truck was at the time running at a speed of fifteen to twenty miles an hour, as testified to by the two boys, although the injury was one that might have happened at whatever speed the truck was running if the boy in attempting to alight missed the step and got his bare foot

No. 1000.

Roy testified to the injury as above stated; also that he thought the driver saw him on the truck before it started and said nothing to him until he had started and was running at a speed of fifteen to twenty miles an hour when he suddenly told him to get off, waving his arms and frightening him so that in his attempt he missed the step. One of the other boys testified that he could not from the rear of the truck see the driver, but heard him say "get off the truck" when they were running fifteen to twenty miles an hour. The driver testified that he did not see the boys at all and did not know they were on the truck or that anything had happened until some cry of a bystander warned him that someone was hurt. He then stopped, went back and inquired of the boy about the injury, and was told that he was trying to get on while the truck was in motion, and missed the step, and got his foot lost in the chain. These were all the witnesses called as to the manner of the accident. The helper was a transient that only worked for appellant, that day, and his whereabouts were unknown at the time of the trial. The other of the three boys was not available as a witness. Appellant's main contention is that the evidence does not warrant a verdict for the plaintiff; and in answering that question we disregard the evidence of the driver as to where Roy got on the truck and assume that he got off on and off as he says he did. We are inclined to the opinion that the jury might be warranted in finding willful and wanton conduct of the driver if the truck was at the time running at a speed of fifteen to twenty miles an hour, as testified to by the two boys, although the injury was one that might have happened at whatever speed the truck was running if the boy in attempting to alight missed the step and got his bare foot

in the moving chain. The driver testified that the road was muddy and that he was running on low, and at no time after he left the store over three or four miles an hour; that the accident happened within one block of the place where the boys say they climbed on; that he was about to turn a corner, and in the condition of the road and of his machine he could not run much faster than that. The evidence leaves no doubt that the street was unpaved, rough and slippery from the effect of rain; though there is some conflict whether it was raining at the time. It is also proven and entirely uncontradicted that there was a governor or controller on the engine that limited the extreme speed to twelve miles an hour. We conclude, therefore, that the testimony of the two boys as to the rate of speed is entirely unworthy of credit; that there is no evidence in the record from which it can be reasonably concluded that the truck was running at a speed that would make it apparently dangerous for the boys to alight while it was moving. An entirely different question would arise if Roy had been a passenger or helper, or under circumstances and conditions that charged appellant with a duty to safely carry him. But we think under the facts, as they exist, even assuming that the driver ordered the boy to get off the car while it was in motion, there is no reasonable ground for saying that he was guilty of wilfully and wantonly injuring him. There is no question of attractive nuisance involved. We therefore conclude that the evidence entirely fails to fix a liability upon appellant. And assuming that another trial would not result in materially changing the evidence of facts as here assumed, the judgment is reversed without remanding the cause.

Finding of Facts. We find that the defendant was not guilty of any negligence charged in the declaration. Reversed. Niehaus J. took no part.

in the moving chain. The driver testified that the road was
well and that he was running on low, and at no time after
he left the store over four miles an hour; that the
accident happened within one block of the place where the boys
saw it; that he was about to turn a corner, and
in the condition of the road and of his machine he could
not run much faster than that. The evidence leaves no doubt
that the street was uneven, rough and slippery from the ef-
fect of rain; though there is some conflict whether it was
raining at the time. It is also proven and entirely un-
contested that there was a governor or controller on the
engine that limited the extreme speed to twelve miles an hour.
It is also proven, that the testimony of the two boys
as to the rate of speed is entirely unworthy of credit; that
there is no evidence in the record from which it can be
reasonably concluded that the truck was running at a speed
that would make it apparently dangerous for the boys to alight
while it was moving. An entirely different question would
arise if Roy had been a passenger or helper, or under cir-
cumstances and conditions that charged appellant with a duty
to safely carry him. But we think under the facts, as they
exist, even assuming that the driver ordered the boy to get
off the car while it was in motion, there is no reasonable
ground for saying that he was guilty of willfully and wantonly
injuring him. There is no question of attractive nuisance
involved. We therefore conclude that the evidence entirely
fails to fix a liability on appellant. And assuming that
another trial would not result in materially changing the
evidence of facts as here assumed, the judgment is reversed
without remanding the cause. We find that the defendant was not guilty
of any negligence charged in the petition. Reversed.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

THE
CITY OF
WASHINGTON
DISTRICT OF COLUMBIA
OFFICE OF THE
COMMISSIONER OF THE
GENERAL LAND OFFICE
WASHINGTON, D. C.
JANUARY 10, 1917
TO THE
SPECIAL AGENT IN CHARGE
OF THE
LAND OFFICE
AT
SALT LAKE CITY, UTAH
SIR:
I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.
Very respectfully,
COMMISSIONER OF THE GENERAL LAND OFFICE

(441a)
213 I.A. 696

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Carmichael, J.

*By letter
5/23/19*

Gen. No. 6633.

Sears, Roebuck & Company,

appellee

213 I.A. 696

vs

Appeal from Co. Ct. Kankakee.

O. B. Englisch, appellant.

^ Sears Roebuck & Company, the appellee, sued O. B. Englisch, the appellant, before a justice of the peace on an account for merchandise sold and delivered, and had a judgment there, from which the defendant appealed to the county court, where, on a trial by the court without a jury, there was a judgment for the plaintiff for \$164.84 from which the defendant prosecutes this appeal.

Appellant in his statement of the case here says there is no evidence of any goods sold or furnished by the appellee to him; but on the contrary it is clear and conclusive that the goods in question were sold and delivered to the Unifile Manufacturing Company, a corporation, of which he is president, and therefore that there is an entire absence of evidence to support the judgment.

The bill of exceptions shows no exception to the judgment and appellees only answer to appellants contention is that in a trial before the court without a jury, if no exception to the judgment is taken, the sufficiency of the evidence is not before the appellate court for review. Such was the rule before the amendment of section 81 of the Practice Act, designed to avoid the necessity of formal exceptions to rulings of the court. (Miller v Anderson, 269 Ill. 608, 622.) In city of Lewistown v Harrison, 282 Ill. 461, 486, the court summarized the holding in Miller v Anderson, supra, as follows- "that the incorporating of formal exceptions into the record in order to preserve the ruling of the trial court for review is unnecessary, and that this applies to the requirements for

393 .A.1315

9-123994

C. D. English, appellant.

Further, the appellant, before a Justice of the Peace on an

...ent there, from which the defendant appealed to the county

was a judgment for the plaintiff for \$184.84 from which the

Appellant in his statement of the case here says there

test evidence has also in it written out no such ;min. of

Manufacturing Company, a corporation, of which he is president.

• strength and fire

and appellees only answer to appellees contention is that in

the judgment is taken, the sufficiency of the evidence is not

For the amendment of section 81 of the Practice Act, designed

Судебный департамент при Верховном Суде Российской Федерации

the holding in Miller v Anderson, supra, as follows: "That the

to preserve the ruling of the trial court for review is an

necessary, and that this applies to the requirements for

an exception as to the entry of the judgment."

The facts disclosed by the record evidence fully warrant appellant's statement of the case, leaving no ground for controversy on that and, as we have before said, it is not controverted. We are of the opinion that the only point made by appellee that there was no exception to the judgment is fully answered by the authorities above noted; therefore the judgment should be reversed and the cause remanded.

Finding of fact:

We find that appellant, O. B. Englisch, was not indebted to appellee, Sears Roebuck & Company, in any amount.

Reversed.

an exception as to the entry of the judgment."

The facts disclosed by the record evidence fully

arrant appellant's statement of the case, leaving no ground for controversy on that and, as we have before said, it is not controverted. We are of the opinion that the only point raised, and which there was no exception to the judgment is fully answered by the authorities above noted; therefore the judgment should be reversed and the cause remanded.

Final of case: A bill of the state of Ohio, vs. the

We find that appellant, O. B. English, was

not indebted to appellee, George Rosbrook &

Company, in any amount.

of any goods sold or delivered

but on the contrary it is clear and conclusive that

as in question were sold and delivered to the United

States Trust Company, a corporation, which is no person,

and therefore that there is no valid account or balance in

against the judgment.

The bill of exception shows no exception to the judgment

and appellant only sought to show that exception is that in

trial before the jury, and that the exception is not

judgment is taken, and the exception is not

before the appellate court, and the exception is not

for the amendment is taken as a matter of course

to avoid the necessity of a new trial to obtain

court. (Miller v. Harrison, 10 Ohio St. 221.)

or Newstown v. Harrison, 10 Ohio St. 221.)

the holding in Miller v. Harrison, 10 Ohio St. 221.

incorporating or otherwise, and the exception is not

to preserve the rights of the parties, and the exception is not

STATE OF ILLINOIS, { SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6028

(442a)

213 I.A. 696

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

1919

editors
notice
notice
Clerk

MEMBER that as regards, to-wit: in
1919, the opinion of the Court was filed in
the office of said Court, in the words and figures
to-wit:

Gen. No. 6626.

Agenda No.41.

October Term, 1918.

213 I.A. 696

R. H. Hatheway,
Appellee,

-vs-

Appeal from County Court,
Peoria County.

Peoria Railway Company,

Appellant.

Carnes, J.

About four or five o'clock in the afternoon of December 7, 1916, appellee, R. H. Hatheway, backed a Ford automobile from the place where it had been standing at the side of a public street in Peoria towards the center of the street about thirty feet distant and on to the street car track there of the appellant railway company, where it was hit by an approaching street car and damaged. He brought this action in the county court of Peoria county and charged in different counts of his declaration careless and negligent management of the street car as the cause of the injury, in one count alleging that it occurred while he was riding rinding along the street, and in another that it was while his authomobile was stalled upon the track and he was unable to start it, alleging in each count due care on his part. He had a judgment on a verdict for \$200., from which the defendant appeals.

There is no question but at the street side where the automobile was standing and from there back to appellant's track there was a clear view in the direction from which the street car was approaching for two city blocks, and it could have been seen by appellee had he looked. He did not look after he cranked his car to back out, although he was some considerable time in getting on to the track because he stopped to exchange a word with a

2131.A.666

R. H. Hatheway, Appellee,
-vs-
Peoria Railway Company, Appellant.

Peoria Railway Company,
Appellant.

Case No. 1.

About four or five o'clock in the afternoon of December 7, 1916, appellee, R. H. Hatheway, backed a Ford automobile from the place where it had been standing at the side of a public street in Peoria towards the center of the street about thirty feet distant and on to the street car track there of the appellant railway company, where it was hit by an approaching street car and damaged. He brought this action in the county court of Peoria county and charged in different counts of his declaration carelessness and negligent management of the street car as the cause of the injury, in one count alleging that it occurred while he was riding along the street, and in another that it was while his automobile was stalled upon the track and he was unable to start it, alleging in each count one cause on his part. He had a judgment on a verdict for \$200, from which the defendant appeals.

There is no question but at the street side where the automobile was standing and from there back to appellant's track there was a clear view in the direction from which the street car was approaching for two city blocks, and it could have been seen by appellee had he looked. He did not look after he cranked his car to back out, although he was some considerable time in getting on to the track because he stopped to exchange a word with

bystander. It was a one line track and cars habitually ran only in the direction from which this car was approaching. Appellee knew and had long known that fact. The automobile was struck as he was about to turn from his straight backward course, and when it was, according to his testimony, just barely on the track. Three of the defendant's witnesses testified without contradiction that the street car^{was} when he turned only twenty or thirty feet away. The street car had made a right angled turn on to the street two blocks before the point in question. The testimony is in conflict as to how fast it was approaching, but it could hardly have been running at a very high speed under those conditions. Appellee testified that his car was spitting as he turned on reaching the track, but he does not say and there is no evidence that it was disabled so that he could not keep it out of danger if he had seen the approaching car. The automobile had been run about fifteen thousand miles, and the estimates of various witnesses as to the damage were from \$29.00 to \$239.50. Appellant's counsel suggest that \$200. is more than a second hand Ford automobile of that description was at that time worth, and that there is no claim that it was made worthless by the injury; therefore the verdict is excessive. While there is much common knowledge of the value of second hand automobiles of that make, still it has not reached the point where we can take judicial notice of those facts. The question is also raised whether the car belonged to plaintiff or to his father. But if appellee was not himself in the exercise of ordinary care at the time of the injury no other point need be considered. Appellee's counsel cite many cases where courts have held that the questions of negligence of the defendant and due care of the plaintiff are

system. It was a one line track and cars habitually ran
 only in the direction from which this car was approaching.
 Appeal was made and long known that fact. The automobile was
 struck as he was about to turn from his straight backward course,
 and when it was, according to testimony, just barely on the
 track. The defendant's witnesses testified without
 contradiction that the street car when he turned only twenty
 or thirty feet away. The street car had made a right angled turn
 on to the street two blocks before the point in question. The
 testimony is in conflict as to how fast it was approaching, but it
 could hardly have been running at a very high speed under those
 conditions. Appellee testifies that his car was splitting as he
 turned on reaching the track, but he does not say and there is no
 evidence that it was disabled so that he could not keep it out of
 danger. If he had seen the approaching car. The automobile had been
 run about fifteen thousand miles, and the estimate of various
 witnesses as to the damage were from \$20.00 to \$250.00. Ap-
 pellee's counsel suggest that \$250.00 is more than a second hand
 Ford automobile of that description was at that time worth, and
 that there is no claim that it was made worthless by the injury;
 therefore, the verdict is excessive. While there is much common
 knowledge of the value of second hand automobiles of that make,
 still it has not reached the point where we can take judicial
 notice of those facts. The question is also raised whether the
 car belonged to plaintiff or to his father. But if appellee was
 not himself in the exercise of ordinary care at the time of the
 injury no other point need be considered. Appellee's counsel
 cite many cases where courts have held that the question of
 negligence of the defendant and the care of the plaintiff are

for the jury and therefore must not be decided by the trial court as matter of law except under certain specified conditions of the proof. It is assigned for error in this case that the court erred in overruling the motion of the defendant at the close of the evidence to direct a verdict in its favor. Those authorities are in point on that assignment. But it is also assigned that the court erred in overruling the defendant's motion for a new trial because the verdict of the jury is contrary to the evidence. In consideration whether the verdict is clearly and manifestly against the weight of the evidence we will assume that the question of the plaintiff's care was properly submitted to the jury. We do not see how they could reasonably conclude that he was in the exercise of the required degree of care. While a failure to look and listen is not as matter of law negligence under the holdings in our state; yet, it may be as matter of fact such negligence under given circumstances that no recovery should be permitted. There is no doubt on this record that had the plaintiff given any attention whatever to the fact that the street car might be approaching he could and he would have avoided the accident. The street car operators would have avoided the accident by assuming that appellee, in plain sight of the approaching car, would back on to the track entirely oblivious of his danger; and we may assume, without holding, that it was within the province of the jury to find them negligent; but the jury in determining the question of negligence were required to use the standard of the ordinarily prudent man acting under the same or similar circumstances, and to say that they could so measure the street car operators and find them below the standard, and then apply the same rule to the plaintiff and find that he measured up to the

... It was a one issue trial
for the jury and therefore must not be decided by the trial
court as matter of law except under certain specified conditions
of the proof. It is assigned for error in this case that the
court erred in overruling the motion of the defendant at the close
of the evidence, to direct a verdict in its favor. Those an-
swers are in point on that assignment. But it is also assigned
that the court erred in overruling the defendant's motion for a
new trial because the verdict of the jury is contrary to the evidence.
In consideration whether the verdict is clearly and manifestly
against the weight of the evidence we will assume that the question
of the plaintiff's care was properly submitted to the jury. We do
not see how they could reasonably conclude that he was in the
wrong of the required degree of care. While a failure to look
and listen is not as matter of law negligence under the holding
in our state; yet, it may be as matter of fact such negligence
under given circumstances that no recovery should be permitted.
There is no doubt on this record that had the plaintiff given
any attention whatever to the fact that the street car might be
approaching he could and he would have avoided the accident.
The street car operators would have avoided the accident by
warning that appliance, in plain sight of the approaching car,
would back on to the track entirely oblivious of his danger;
and we may assume, without holding, that it was within the province
of the jury to find them negligent; but the jury in determining
the question of negligence were required to use the standard of
the ordinarily prudent man acting under the same or similar cir-
cumstances, and to say that they could so measure the street car
operators and find them below the standard, and then apply the
same rule to the plaintiff and find that he measured up to the

requirements seems to us little less than absurd. It is true that each party had equal rights in the street, but each was equally bound to respect the rights of the other. Similar cases have been before the appellate courts, and the doctrine is so familiar that it need not be here enlarged upon. See *Lee v. Chicago City Ry. Co.*, 127 Ill. App. 510; *Hawk v. Peoria Railway Company*, 154 Ill. App. 473; and the late case of *Dillon v. Peoria Ry. Co.*, - not reported - decided by this court, opinion filed August 7, 1917. We conclude that in any view of the testimony appellee was not in the exercise of due care for his own safety, and that his negligence contributed to the injury; therefore he cannot recover. The judgment will be reversed and the cause not remanded.

Reversed.

Finding of Facts: We find that appellee was not at the time in question in the exercise of due care for his own safety; that he was then negligent, and his negligence was a contributing cause of the injury complained of.

reparations seems to us little less than absurd. It is true that each city had equal rights in the street, but each was equally bound to respect the rights of the other. Similar cases have been before the appellate courts, and the doctrine is so familiar that it need not be here enlarged upon. See Lee v. Chicago City Ry. Co., 127 Ill. App. 510; Hawk v. Peoria Railway Company, 154 Ill. App. 47; and the late case of Dillon v. Peoria Ry. Co., -- not reported -- decided by this court, opinion filed August 7, 1917. We conclude that in any view of the testimony appellee was not in the exercise of due care for his own safety, and that his negligence contributed to the injury; therefore he cannot recover. The judgment will be reversed and the cause not remanded.

negligence was a contributing cause of the injury sustained by the plaintiff.

STATE OF ILLINOIS, {
SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6627

*Certiorari denied
by Sup. Ct.
June 1919*

443a

213 I.A. 697

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. ✓ CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R-H. Denied Apr 9. 1919

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

EXHIBIT 808

the first day of October,
nine hundred and eight-
ty of the State of

Residing Justice.

CHRISTOPHER C. DUFFY,
DAVIS, Sheriff.

IT IS REMEMBERED, that at twelve, to-wit: on
January 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6627.

Agenda No. 42.

October Term, 1918.

213 I.A. 697

Joseph F. Doubet, Appellee,

-vs-

Appeal from Peoria.

Peoria Railway Company,

Appellant.

Carnes, J.

In May 1915, appellee, Joseph F. Doubet, a farmer, thirty-nine years old, living near Peoria, Illinois, came from his farm to that city with a team of young horses hitched to a wagon upon which was a hayrack loaded with baled straw, and while he was in the day time driving along a sparsely settled paved street he met an electric car of the appellant railway company in charge of a conductor and motorman, with no passengers aboard. The horses were frightened by the approaching car and got beyond the driver's control, running the wheel of the wagon on to the curb of the street, throwing him out and severely injuring him. Appellee's claim is that as the car approached the motorman at quite a distance saw or might have seen that the team was frightened; that he needlessly and continuously sounded the gong and disregarded his sign to stop the car; that it was running about twenty miles an hour, and that this improper action of the motorman caused the team to get beyond his control. The declaration in different counts so averred. The defendant plead the general issue and its theory of the case is that the car was approaching slowly, the gong was not sounded, and neither the motorman nor conductor observed that the horses were frightened. There was a verdict for the plaintiff for \$5000., upon which judgment was entered, and the defendant appeals.

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disregarded his sign to stop the car; that it was running about
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of the street, throwing him out and severely injuring him.

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horses were frightened by the approaching car and got beyond the
of a conductor and motorman, with no passengers aboard. The

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in the day time driving along a sparsely settled paved street
which was a hayrack loaded with belad straw, and while he was

to that city with a team of young horses hitched to a wagon upon
nine years old, living near Peoria, Illinois, came from his farm
In May 1913, appellee, Joseph R. Donnet, a farmer, thirty-

Peoria Railway Company,
-
Joseph R. Donnet,
Appellant.

Appeal from Peoria.

2131A.697

Agenda No. 42.

October Term, 1913.

It is urged that there is no sufficient evidence of the defendant's negligence. This depends upon the testimony of only four witnesses. Appellee's son was with him on the load of straw. The father and son each testified that appellee stopped his team when he saw the car approaching; that the horses manifested fright by weaving from side to side; that appellee raised his hand to signal the car to stop; that no attention was paid ^{to} by him by the motorman and conductor; and that the gong was continuously and loudly sounded for several rods before reaching the team. The motorman and conductor each testified that they were approaching slowly; that there was no occasion to sound the gong, and it was not sounded; and that they were given no signal to stop. There was no obstruction of vision. The motorman saw, or could have seen the team. If it happened as appellee and his son testified the defendant is chargeable with gross negligence. It need not be considered whether it should have stopped its car, because to needlessly sound the gong in the manner claimed could have no other effect than to frighten the horses. It is rather a question of fact than of law. But appellee cites Galesburg Electric Motor & Power Co., v. Manville, 61 Ill. App. 490; and Wachtel v. East St. Louis & St. L. Electric Ry. Co., 77 Ill. App. 465, as instances where appellate courts have had similar conditions under consideration and reached similar conclusions as to the duty of the motorman. Authorities are collected in a note in 21 L.R.A.-N.S.- 285. It has sometimes occurred that the act of the motorman was so clearly negligence or not that courts have properly assumed the one thing or the other in instructions to the jury. In the present case if the motorman sounded the gong as claimed by appellee and nothing in the operation of his car required it, as he himself admits, he was

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defendant's negligence. This depends upon the testimony of only
two witnesses. Appellee's son was with him on the load of straw.
The defendant son each testified that appellee stopped his team
when he saw the car approaching; that the horses manifested fright
by waving from side to side; that appellee raised his hand to
signal the car to stop; that no attention was paid by him by
the motorman and conductor; and that the gong was continuously
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are collected in a note in 21 L.R.A.-N.S.-285. It has sometimes
occurred that the act of the motorman was so clearly negligent
that that courts have properly assumed the one thing or the
other in instructions to the jury. In the present case if the
motorman sounded the gong as claimed by appellee and nothing in the
operation of his car required it, as he himself admits, he was

unquestionably guilty of a malicious act. There was a direct conflict of testimony with little ground for saying that the witnesses on either side were honestly mistaken. If the plaintiff's witnesses were believed, the defendant was guilty. If the defendant's witnesses were believed, nothing improper occurred. There is seldom presented a better example of a controverted question depending upon the credibility of witnesses where the verdict of the jury either way should be accepted.

Appellant suggests that it was negligence to drive these young horses on that street. It appears that appellee could have reached his destination by another street. But whether that was practicable is not shown. One of the horses had been worked about two years, and the other about one year. One of them had only been driven into the town twice before, but they were a work team that had been used generally about the farm work. The older one had been on the city streets three or four times, and there was no more reason to presume they would become unmanageable than would exist with usual teams of young horses. The street was laid out for travel by vehicles as well as street cars. There was ample room between the car track and the curb for the wagon to pass, and whether the ordinarily prudent farmer would take the same course under the same or similar circumstances was a question for the jury. The court instructed them if the plaintiff prior to the accident knew that his team was likely to scare at street cars, then he assumed the risk of the consequences that might reasonably result from driving it where he would likely meet street cars. We see no reason for rejecting their conclusion that appellee was in the exercise of ordinary care.

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they were a work team that had been used generally about the
farm work. The older one had been on the city streets three
or four times, and there was no more reason to presume they would
become unmanageable than would exist with small teams of young
horses. The street was laid out for travel by vehicles as well
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it where he would likely meet street cars. We see no reason for
rejecting their conclusion that appellee was in the exercise of
ordinary care.

It is urged that the verdict is excessive. Appellee was physically well and capable, operating a farm of about 140 acres. He was thrown under his wagon and severely bruised and injured on his head and various parts of his body, suffering much pain for many days, and there was a permanent injury to his arm, so that it could not be used in many kinds of farm labor. He still suffers pain in his arm and shoulder. It belongs to a class of injuries in which the jury find compensation without definite evidence of the amount of money loss. It is undisputed that appellee's usefulness is permanently much impaired. We think the injuries, temporary and permanent, together warranted the verdict.

It is urged that the court erred in instructions to the jury as to the duties of the motorman, and *I. St. L. & St. L. Electric Ry. Co., v. Wachtel*, 63 Ill. App. 181, is cited. It is a case where the court undertook to define those duties and erred, and the appellate court concluded that there was no duty to stop the car or stop sounding the gong merely from the fact that the horses appeared frightened; that ordinarily in such cases the driver is able to control his horses, and the motorman may so assume. Counsel also cite *Joliet R. R. Co., v. Eich*, 96 Ill. App. 240, where it is indicated that the motorman is not negligent unless he sees or might see not only that the team was frightened, but that it was likely to become unmanageable; and *Kankakee Electric Ry. Co., v. Lade*, 56 Ill. App. 454, holding that the duty of motormen is to use reasonable care to avoid damages after discovering there is danger. As we have before said, questions presented in such cases are usually of fact and not of law. Horses become frightened at street cars under a variety of conditions, and surroundings.

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Also cite Joliet R.R. Co. v. Mich. 96 Ill. App. 240, where it is
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 v. Lake, 96 Ill. App. 454, holding that the duty of motorman is to
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 danger. As we have before said, questions presented in such
 cases are usually of fact and not of law. Horses become frightened
 at street cars under a variety of conditions, and surroundings.

No minute, helpful rule of law can be announced as to when a motorman should or should not stop his car, and when he should or should not sound his gong. Attempts to go much into detail and announce rules of that kind encroach upon the province of the jury. The general rule of law is that each party must measure up to the standard of ordinarily prudent men under the same or similar circumstances. It follows safely from that that the men in charge of the car is not guilty of negligence if there is no perceptible danger. But it is for the jury to determine under all the facts and circumstances of each case whether the defendant's servants were acting reasonably and prudently measured by acts of reasonable, prudent men under the same or similar conditions. We see no error prejudicial to appellant in giving or refusing instructions on the questions of defendant's duty. Appellee's ~~ix~~ instruction was general, telling the jury that the defendant was liable if it performed the acts complained of (reciting them) when its servants "knew or might have known by the exercise of reasonable care and caution that the plaintiff's team was likely to become frightened and unmanageable thereby, and the plaintiff's team did thereby become frightened and unmanageable, and got beyond the plaintiff's control as a direct result thereof." They were in other instructions told that the mere fact that the team ran away and the plaintiff was injured thereby is not any evidence of negligence or carelessness on the part of the defendant; that if the plaintiff was careless or negligent prior to or at the time of the injury, and such carelessness helped to bring about the injury, he could not recover; that if the injury was the result of a mere accident he could not recover; that unless they believed from the evidence the motorman

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part of the defendant; that if the plaintiff was careless or
negligent prior to or at the time of the injury, and such care-
lessness helped to bring about the injury, he could not recover;
that if the injury was the result of a mere accident he could not
recover; that unless they believed from the evidence the motorist

saw, or by the exercise of reasonable care could have seen that the horses had become unmanageable, and the plaintiff was in danger of injury before said street car reached the point where it could have been stopped before it reached the team, then they should find the defendant not guilty; that even if the motorman saw the plaintiff give a signal to stop it did not become his duty to do so or slacken speed or refrain from ringing the gong unless he saw or by the exercise of reasonable care could have seen that plaintiff's horses would thereby become unmanageable, or that plaintiff was thereby put in a position of danger and injury. We think the instructions on that question, taken as a whole, were quite as favorable as defendant could reasonably ask.

Plaintiff's instruction on the measure of damages told the jury they might consider, among other things, plaintiff's "loss of time and any expenses he may have reasonably incurred or money laid out and expended for medical services, medicines or otherwise, in and about being healed of such injuries, of which he complains in his declaration, or some one count thereof, if any are shown by the evidence to be the necessary result thereof." They were also instructed that in estimating the amount of damages "resulting from any permanent injuries which may have been proven it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof and by considering them in connection with their own knowledge, observation and experience in the business affairs of life." It is argued that these instructions left the jury to estimate damages from loss of time, which was capable of certain proof

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It is argued that these instructions left the jury to estimate
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and for medical attendance, while there was no proof that anything had been expended by appellee on that account. We do not think the jury would so understand the instructions. The court modified the former by inserting the words-"if any are shown by the evidence", and the latter by confining the damages that they might assess without specific evidence of the amount, to "permanent injuries." It is true damages assessed on loss of future earnings should be based on evidence and not on the jury's knowledge, observation and experience in the ordinary affairs of life in cases where the plaintiff is earning a definite sum of money, as for instance, a salary that he is deprived of for a definite time. There was no proof of value of time lost, or of money expended for medical attendance. There was evidence of entire loss of time for a period, and of medical attendance, but no attempt on the trial to show the value of those items. Appellee therefore was not entitled to an instruction that the jury might consider them, and had it been given, as offered, it might have been serious error. But the court modified it by limiting the right to whatever was shown by the evidence, and while the instruction should not have included items on which there was no evidence, still, as the jury were told that they could not consider them in the absence of evidence, it could work little harm. The other instruction as to what the jury might estimate in connection with their own knowledge, observation and experience of the business affairs of life, was limited by the modification of the court to permanent injuries. This was more favorable to the defendant than it could have asked, because the jury might have understood it excluded pain and suffering from temporary injuries, and other elements that fall within the well recognized rule requiring no definite proof of money loss. The instructions literally construed did not permit the jury to include in their verdict

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the value of lost time while appellee was totally disabled, or the value of medical services, and we do not think it reasonable to assume that they did so. Similar questions were before the court in North Chic.St.R.R.Co., v.Fitzgibbons, 180 Ill.466; and Keokuk Bridge Co., v.Wetzel, 228 Ill.253. We think on the authority of these cases the instructions considered either alone or together should not be held reversible error. Read together the defendant profited quite as much as the plaintiff from any error in their statements.

Error is assigned on the argument to the jury of appellee's counsel. It is claimed that it was a deliberate attempt to arouse their prejudices and that it comes within the condemnation of this court expressed in Eilers v.Peoria Railway Co., 200 Ill.App.487. The entire argument is presented in the bill of exceptions, and the part objected to is abstracted. The special points made in appellant's brief are that counsel said that there was not money enough in the coffers of the defendant company to pay him for the injury if it had happened to him. The court sustained an objection to that statement, and said it was not a measure of damages. Counsel then made some comment on the testimony as to the rate they were running, and said if they would put more cars on the street they would not have to run that fast to keep up with the schedule. The court sustained an objection to that statement, and warned counsel not to go outside of the record. Counsel then argued that the conductor's statement of the rate of speed was only learned from what the motorman told him. There was some ground for that argument, and the court overruled an objection to that statement. We see no error

the value of lost time while applicant was totally disabled,
or the value of medical services, and we do not think it
reasonable to assume that they did so. Similar questions
were before the court in North v. St. L. & N. O. Ry. Co., 111 Ill. 253.
112 Ill. 466; and Leokuk Bridge Co. v. Wetzel, 228 Ill. 253.
We think on the authority of those cases the instructions
considered either alone or together should not be held re-
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Counsel then argued that the conductor's statement of the
rate of speed was only learned from what the foreman told
him. There was some ground for that argument, and the court
overruled an objection to that statement. We see no error

in the rulings of the court on these questions. And while the statements that the court sustained objections to were clearly improper, there was nothing in those statements, taken by themselves or in connection with the whole speech, likely to prejudice the jury. The remarks, coupled with the necessary rebuke of the court, were more likely to harm than help the plaintiff.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

Niehaus, J. took no part.

in the regions of the heart or lungs, and in the case of the heart, the disease is usually accompanied by a general debility of the system, and the patient is often unable to perform his ordinary duties. The disease is usually accompanied by a general debility of the system, and the patient is often unable to perform his ordinary duties.

1917

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[illegible]

... I took no part.

... I took no part.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

that the testimony is a
of record in my office
in testimony
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ing of
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A separate Court in this
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the separate Court in
reason of the Board and what
the Court in

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213 I.A. 697

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. ✓ CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

U. S. DISTRICT COURT

CHRISTOPHER G. DUFF
M. DAVIS,

... to-wit: ...
... the opinion of the Court was filed in ...
... the words and figures ...

213 I.A. 697

Gen. No. 6634

Willard D. Parker, appellant.

vs

Appeal from Lee.

Harmon Farmers' Grain and

Coal Company, appellee.

Carnes, J.

The appellee, Harmon Farmers' Grain and Coal Company bought some oats of L. Carl McWilliams, the tenant on a farm owned by Willard D. Parker, the appellant. Appellee knew that the grain was raised on leased premises and therefore bought with the knowledge that the landlord might have a lien on the same for the payment of the rent. This action on the case was brought by the landlord, and a declaration filed containing the necessary allegations. The general issue was pleaded. There was a trial by the court without a jury.

The only defense was that appellant, the landlord, had consented to the sale of the grain in question. The tenant McWilliams, testified that he talked with appellant about the sale of the grain and asked him if he ~~would~~ should notify him when he threshed, and what he should do about selling the oats that appellant answered it was not necessary to notify him about threshing because he was paying cash rent and that he gave his other tenant the privilege of selling his oats and collecting the money for them and he wished to use him, McWilliams, the same way. The tenant's father testified that he met appellant and told him they were going to thresh in a few days and that his son said he, appellant, was giving him leave to sell the oats, and appellant answered, yes, sir; and the witness told him he was going to sell them up to the elevator, and he answered all right that he gave him permission to sell the oats, and he was going to pay \$300 of the money

2131A.687

Gen. No. 2214

William D. Parker, Plaintiff.

Appeal from Dec.

vs

Harrison Farmers' Grain and

Coal Company, Defendant.

Case No. 10,000

The appellee, Harrison Farmers' Grain and Coal Company, brought some oats of L. Carl McWilliams, the tenant on a farm owned by William D. Parker, the appellant. Appellee knew that the grain was raised on leased premises and therefore sought with the knowledge that the landlord might have a lien on the same for the payment of the rent. This action on the case was brought by the landlord, and a declaration filed containing the necessary allegations. The general issue was joined. There was a trial by the court without a jury. The only defense was that appellee, the landlord, had consented to the sale of the grain in question. The tenant McWilliams, testified that he talked with appellee about the sale of the grain and asked him if he wanted should notify him when he threshed, and what he should do about selling the oats. Appellee answered it was not necessary to notify him about threshing because he was paying cash rent and that he gave his other tenant the privilege of selling his oats and collecting the money for them and he wished to use him. McWilliams, the same way. The tenant's father testified that he and appellee and told him they were going to thresh in a few days and that his son said he, appellee, was giving him leave to sell the oats, and appellee answered, yes, sir; and the witness told him he was going to sell them up to the elevator, and he answered all right that he gave him permission to sell the oats, and he was going to pay \$200 of the money

and the balance of the rent was to be paid out of the corn. Appellant testified that he had no such conversation with either of them. The court apparently believed the two witnesses instead of the one, and entered judgment for the defendant.

We see little if any, ground for contention that appellant did not consent to the sale of the grain. Counsel say the language said to be used by him in talking with the tenant did not amount to a consent, but was only the expression of a desire on his part to treat his tenants alike. We see no ground for this contention. It is also suggested that the consent should have been in writing, but counsel find no authority supporting or tending to support, that proposition and we know of none. Counsel also suggest that a purchaser is not protected in buying grain raised on demised premises merely by the fact that the landlord had authorized the tenant to sell and receive the proceeds, but it must appear further that the purchaser is aware of such authorization at the time he buys the grain, and assume that *Faith v Taylor* 69 Ill. App. 419 is authority for that position. It is said in that case that where the landlord authorizes the tenant to sell and receive the proceeds and the purchaser is aware of the fact there can be no recovery. The court was discussing the facts as they appeared in that record. There is no intimation in the opinion that the purchaser would be guilty of a wrongful act injurious to the landlord in buying grain that the landlord had authorized ~~his~~ his tenant to sell, even though the purchaser did not inquire whether the tenant had that authority. No man can acquire title to the property of another by purchase from some one not authorized to sell it, and he can acquire title to another's property by purchase from some one authorized to sell and convey it. Appellant had only a limited interest in the grain sold, but if he had the

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it, and he can acquire title to another's property by purchase
from some one authorized to sell and convey it. Appellant had
only a limited interest in the grain sold, but if he had the

absolute property and right of possession appellee could have acquired title from any man that appellant had authorized to sell the grain and receive the money for it. The question is whether the agent had authority and not whether the purchaser knew he had authority to sell. This is the general principle applicable to sales by one man of the property of another man and we know of no reason why it should not be applied to a disposal of the interest of a landlord in his tenant's crops.

Appellant on the trial submitted eleven propositions of law which were each marked held by the court, and no error in any ruling on the evidence is suggested. We find no error in the record; therefore the judgment is affirmed.

Affirmed.

absolute right and right of possession and right of disposal. The question is whether the agent had authority and not whether the purchaser knew he had authority to sell. This is the principle applicable to sales by one man of the property of another man, and it seems to me that it should be applied to a disposal by a partner in a partnership.

As stated on the facts, the partner who sold the property of the firm was not authorized to do so, and the purchaser was not bound to know that he was not authorized to do so.

In the present case, the partner who sold the property of the firm was not authorized to do so.

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STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

10

IN SENATE,
January 1, 1891.
REPORT
OF THE
COMMISSIONER OF THE LAND OFFICE,
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1890.
ALBANY:
J. B. LEECH, STATE PRINTER,
1891.

6679

*Certiorari allowed
by Sup. Ct.
June, 1919*

445a

2131.A. 697

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

the first day of October,
and nine hundred and eight
District of the State of

Presiding Justice.

Justice.

Justice

Clerk

terwards, to-wit: on
Court was filed in
the words of

Gen. No. 6639.

Agenda 30.

October Term, 1918.

213 I.A. 697

Anna R. Keller, Appellee,

-vs-

Appeal from Rock Island.

State Bank of Rock Island,
Appellant.

Carnes, J.

Prior to June 4, 1914, Mrs. Pearl I. Hawley, had a savings account of \$1874.45 in the appellant's bank, and on that day she had it changed and a new bank book issued in the name of "Pearl I. Hawley or Anna R. Keller." Mrs. Keller is the appellee and the mother of Mrs. Hawley. The fund belonged to Mrs. Hawley. She feared that her husband might interfere with it and for that reason so changed her account. An identification card was signed by both women and left with the bank, and the money was subject to withdrawal on the check of either of them. The bank book was retained by Mrs. Hawley until April 1915, she having, meantime, drawn several small checks against the account, which were honored. It was then taken to the bank by appellee acting for Mrs. Hawley and left there in charge of the cashier, who was then told by appellee that Mrs. Hawley did not feel safe to have the book around in the presence of her husband, and directed to pay out no money and accept no check against the account unless the check was presented personally by Mrs. Hawley or Mrs. Keller, or except upon a check bearing the signature of either of them. This is the ~~statement~~ statement of the direction found in one part of appellee's brief, and in another part counsel assume that the direction was to honor no check unless presented in person by one of the drawers. The fact

October Term, 1913.

Agenda 30.

Gen. No. 229.

2131.A.697

Appeal from Rock Island.

Anna R. Keller, Appellee,

State Bank of Rock Island,

Appellant.

Quinn, J.

Prior to June 4, 1914, Mrs. Pearl I. Hawley, had a savings account of \$1874.50 in the appellant's bank, and on that day she had it changed and a new bank book issued in the name of "Pearl I. Hawley or Anna R. Keller." Mrs. Keller is the appellee and the mother of Mrs. Hawley. The fund belonged to Mrs. Hawley. She feared that her husband might interfere with it and for that reason so changed her account. An identification card was signed by both women and left with the bank, and the money was subject to withdrawal on the check of either of them. The bank book was retained by Mrs. Hawley until April 1915, she having, meantime, drawn several small checks against the account which were honored. It was then taken to the bank by appellee acting for Mrs. Hawley and left there in charge of the cashier, who was then told by appellee that Mrs. Hawley did not feel safe to have the book around in the presence of her husband, and directed to pay out no money and accept no check against the account unless the check was presented personally by Mrs. Hawley or Mrs. Keller, or except upon a check bearing the signature of either of them. This is the material statement of the direction found in one part of appellee's brief, and in another part counsel assume that the direction was to honor no check unless presented in person by one of the drawers. The fact

rests on the testimony of appellee and the cashier. Appellee testified that she told him that he should not accept any check "without my signature or Mrs. Hawley's signature, or personally her or myself". Elsewhere in her same testimony she indicates that she directed him not to honor a check unless it was presented personally by one of the two women. The cashier denies that any direction was given him not to honor a check presented by some other party bearing the signature of either of the two women. The book probably thereafter remained in the custody of the bank. Various small checks were drawn against the account by Mrs. Hawley and paid, until on January 16, 1917, there was, including interest, a credit balance of \$1059.74, which was paid out on a check dated January 2, 1917, payable to Ainsworth Savings Bank and purporting to be signed "Mrs. Pearl Hawley." She had sometime before this date removed to Iowa, and was taken sick December 12, 1916, and died January 18, 1917.

Appellee after her daughter's death demanded payment of appellant, which was refused, and brought this action in assumpsit to recover the balance of the account, and filed as her declaration the common counts with an affidavit of claim, stating that the demand was for the sum due as the balance of the said deposit, which had never been paid by the defendant to either Mrs. Hawley or herself; that Pearl I. Hawley is now deceased and there is due the plaintiff from the defendant the sum of \$1066. The defendant filed the general issue and an affidavit in which it stated as its only defense that all moneys so deposited had been paid out by it to the order of Pearl I. Hawley or Anna R. Keller upon checks duly made and presented by the payees thereof. There was a judgment on a verdict for the plaintiff for \$1059.74. The amount is correct if appellee was entitled

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in which it stated as the only reason for its decision

\$1000. The defendant states that the money was not

and there is no evidence that the money was not

Mrs. Hawley or herself; that Pearl Hawley is now deceased

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her or myself." Elsewhere in her same testimony she indicated

"without my signature or Mrs. Hawley's signature, or personally

testified that she told him that he should not accept any check

rests on the testimony of appellee and the cashier. Appellee

to a verdict.

The issue is limited by the affidavits to the question whether the bank had paid out the money on checks signed by one or the other of the two authorized drawers. It is not denied in the affidavit of defense that appellee had power and authority to draw the fund after the death of her daughter, and no question is raised as to the ownership of the fund; therefore, it stood admitted, as far at least as a default could admit it, that the only defense was that the money had theretofore been paid out on valid checks, which, when taken in connection with admitted facts, means genuine checks drawn by Mrs. Hawley. Counsel for appellee have devoted a considerable part of their brief to the citation and discussion of authorities holding that such is the effect of an affidavit of defense in limiting the issues. That position is not seriously denied by appellant. This court had occasion to so hold and collect the authorities in *Miller v. Thomas*, 200 Ill. App. 125.

Appellee admits that she has no valid cause of action if the check of January 2, 1917, in favor of Ainsworth Savings Bank was genuine; and appellant says "In the final analysis of this case it may be noted the only question of fact to be presented to the jury was whether the check in question was forged." Appellee in her brief refers to the above quoted statement of appellant and says, "If the check purporting to have been drawn by Pearl I. Hawley was in fact drawn by her and the signature thereto was her genuine signature, then when that check was paid by appellant it constituted full payment and was a full and complete defense to this case." But she insists that the

to a verdict. The issue is limited by the affidavits to the question whether the bank had paid out the money on checks signed by one or the other of the two authorized signers. It is not denied in the affidavit of defendant that appellee had power and authority to draw the fund after the death of her daughter, and no question is raised as to the ownership of the fund; therefore, it would be admitted, as far at least as a fact, it could admit it, that the only defense was that the money had theretofore been paid out on valid checks, which, when taken in connection with admitted facts, means genuine checks drawn by Mrs. Hawley. Counsel for appellee have devoted a considerable part of their brief to the citation and discussion of authorities holding that such is the effect of an affidavit of defense in limiting the issues. This position is not seriously denied by appellant. This court has occasion to set aside and collect the authorities in Miller v. ...

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jury must have found the check was a forgery and that there was evidence sufficient to warrant that finding, and if the evidence does not appear in the record it is because the bill of exceptions is not complete. We will later consider the contention that the bill of exceptions is incomplete. Taking up now the question whether under the evidence presented in the record there was any reasonable ground for finding the check in question was a forgery. At the time in question Mrs. Hawley and her husband were living on a farm near Ainsworth, Iowa. The husband was called as a witness for appellant and permitted to testify as to the signing of the check, omitting any conversation with his wife at the time. He testified that she signed ~~an~~ the check in his presence December 12, 1916, leaving the amount and the name of the payee blank, and put it in his pocket; that he took it to the Ainsworth Savings Bank and some officer of that institution from information he gave him undertook to compute the amount of the deposit, with interest; that the amount so obtained was inserted in the proper blank and the name of the Ainsworth Savings Bank inserted as the payee of the check, and the check left there for collection. It was not written on a blank furnished by appellant, but on a blank of some other bank changed by erasures and interlineations to meet the situation. This check in due course through banking institutions reached the appellant bank, and payment was refused because the balance of the account was slightly less than the sum named in the check. It was returned by appellant with a statement of the exact balance of the account, and the figures changed by an officer of the Ainsworth Bank, again forwarded for collection, and paid January 16, 1917, two days before Mrs. Hawley's death.

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The officer of the Ainsworth Bank had some knowledge of Mrs. Hawley's signature, and testified that he thought the signature to this check genuine. But there may be a question whether he had technical knowledge enabling him to identify it. But seven bank officers and experts, testified from a comparison of the signature with the identification card left in the appellant bank that the signatures were written by the same person. Some of them were otherwise acquainted with Mrs. Hawley's signature, and able to testify from that acquaintance that it was genuine; therefore, to prove that the signature is not genuine the testimony of the witness that saw it signed and of seven experts must be overcome. This evidence is only met by the testimony of appellee herself that "It don't look like her signature." Appellee suggests that the jury have made comparisons of signatures in documents that were before them and thus justified a conclusion that ~~the~~ check was not her genuine signature. Most of these documents are photographed and in the record. We fail to discover by comparison any evidence of forgery or want of genuineness of the check. We conclude that the proof showed beyond all reasonable doubt that the check in question bore the genuine signature of Mrs. Hawley. The only witness to the contrary did not venture to express an opinion that it was not, but limited herself to saying that it did not look like it. That was all the evidence introduced in support of the theory of forgery. The case was vigorously tried by able counsel for appellee, and we presume they were entirely unable to produce any credible evidence in contradiction of the mass of testimony offered by appellant that the signature was genuine. It may be noted in this connection that a charge

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bank that the signatures are written by the same person.
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genuine; therefore, to prove that the signature is not genuine
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entirely unable to produce any credible evidence in contradiction
of the mass of testimony offered by appellant that the signature
was genuine. It may be noted in this connection that a charge

of a criminal act can not be sustained in a civil suit by a mere preponderance of the evidence, but we reach our conclusion independent of that consideration.

Appellee claims that the bill of exceptions does not purport to contain all the evidence, and invokes the familiar rule that before an appellate court can consider whether the verdict is supported by the evidence it must appear that all the evidence is preserved for its examination. It is true there is no literal statement such as is usually found in bills of exceptions that it contains all the evidence, but the bill purports to be a stenographic report of what occurred from day to day in the trial; shows that each party introduced testimony and announced that it rested its case. It is quite minute, showing suggestions of counsel, rulings of the court thereon, and various adjournments from time to time. It is on the face of it exactly what one familiar with such matters would expect to find in a full, complete stenographic report of a trial made by an experienced and competent reporter. It is not imperative that there be a literal statement that the bill contains all the evidence. It may appear in some other way. (*Stickney v. Cassell*, 1 Gilm.421.) All that the court requires is to be satisfied that it has before it all the testimony upon which the judgment was to be redicated. (*Harris v. Miner*, 28 Ill. 138) The statement "That the testimony here closed" was held equivalent to an express averment that the bill of exceptions contained all the evidence heard in the cause in *Marine Bank of Chicago v. Rushmore*, 28 Ill. 463. See also *Henline v. Brady*, 110 Ill.App.75; *Fisher v. Chicago City Ry. Co.*, 114 Ill.App.221;

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Chicago v. Rushmore, 28 Ill. App. 483. See also Manning v. Brady,
110 Ill. App. 73; Fisher v. Chicago City Ry. Co., 114 Ill. App. 321;

Zipkie v. City of Chicago, 117 Ill. App. 422; Concordia Fire Ins. Co., v. Bowen, 121 Ill. App. 38; Hill v. Chicago City Ry. Co., 126 Ill. App. 156, Siegel, Cooper & Co., v. Morton, 209 Ill. 201. The court in Siegel, Cooper & Co., v. Morton, was discussing the necessity of a literal statement in the bill of exceptions that it contained all the instructions given in view of prior holdings that it would not consider an assignment of error on the refusal of an instruction if it did not appear in the record and abstract that all the instructions were set out, and said, "There is nothing appearing in either the record or abstract to indicate that they do not contain all the instructions.***** Where the record and abstract purport to give the instructions, it is not necessary to state that no part of the connected series has been omitted." We think within the rule established by the foregoing authorities that the bill of exceptions purports to be a complete record of the proceedings in court, showing all the evidence and what was done and said from day to day. It recites that upon the hearing of the cause "the following proceedings were done and had therein. **** The plaintiff to maintain the issues on her part offered and introduced the following evidence, to-wit:" Then, after reciting various proceedings and adjournments, we find, "Whereupon the plaintiff rested her case in chief.**** Thereupon the defendant offered and introduced the following evidence, to-wit:" And after reciting what it was, "Whereupon the defendant rests its case." And, "Thereupon the plaintiff offered the following evidence in rebuttal." Then the attorneys for the respective parties stated that they had nothing further.

Appellant urges that in no event had appellee any title or ownership in the fund; that it was Mrs. Hawley's money, and appellee had only a checking interest in it. Appellee preliminary to this action presented a check signed by herself for the balance of the money, which is said to have been properly refused because it was presented after the death of the owner of the fund. She also had what her counsel claim was an assignment of the fund by Mrs. Hawley to her consisting of a check drawn in her favor December 1, 1916, specifying the amount as "All the money I have in ----- Dollars, which is near 13 hundred." Appellee also says the bank was warned by Mrs. Hawley as to the payment of money on the account, and disregarded the warning, and appellant says notwithstanding the issues may be narrowed by the affidavits as claimed by appellee, still that does not prevent it from arguing that the evidence incidentally clearly shows no right of recovery. Interesting arguments are presented by counsel on the questions so raised. Appellant also complains of rulings on the evidence and instructions. As we have before seen, these questions only become important if the check of Mrs. Hawley on which appellant parted with the money is found to be a forgery. If the check is genuine, it is clear that appellee is not entitled to a verdict. As we have before said, her counsel admit it, and we see no ground for any other contention. Whatever directions the owner of the fund may have given appellant as to paying it out, she had the legal right to change her mind and direct it to be paid in contravention of those directions, which she did in the most unequivocal and positive way if she signed the check in question.

Concluding as we do that the evidence shows beyond question

Appellant urges that in no event had appellee any title or ownership in the fund; that it was Mrs. Hawley's money, and appellee had only a checking interest in it. Appellee preliminarily to this action presented a check signed by herself for the balance of the money, which is said to have been properly refused because it was presented after the death of the owner of the fund. She also had what her counsel claim was an assignment of the fund by Mrs. Hawley to her consisting of a check drawn in her favor December 1, 1916, specifying the amount as "All the money I have in ----- Dollars, which is near 18 hundred." Appellee also says the bank was warned by Mrs. Hawley as to the payment of money on the account, and disregarded the warning, and appellee says notwithstanding the issues may be narrowed by the affidavits as claimed by appellee, still that does not prevent it from arguing that the evidence incidentally clearly shows no right of recovery. Interesting arguments are presented by counsel on the questions so raised. Appellant also complains of rulings on the evidence and instructions. As we have before seen, these questions only become important if the check of Mrs. Hawley on which appellant purted with the money is found to be a forgery. If the check is genuine, it is clear that appellee is not entitled to a verdict. As we have before said, her counsel admit it, and we see no ground for any other contention. Whatever directions the owner of the fund may have given appellant as to paying it out, she had the legal right to change her mind and direct it to be paid in contravention of those directions, which she did in the most unequivocal and positive way if she signed the check in question.

Concluding as we do that the evidence shows beyond question

the genuineness of the check of Mrs. Hawley on which appellant paid out the balance of the fund in its hands, we must reverse the judgment. And assuming that appellee, herself responsible for introducing that issue into this case, produced all the testimony she was able to find to sustain her position, and that she could not materially strengthen it on another trial, the cause is not remanded.

Reversed.

Finding of Facts:- We find that the check of January 2, 1917, drawn in favor of Winsworth Savings Bank was the genuine check of Pearl I. Hawley duly signed and delivered by her.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

TESTIMONY. I, Granville A. Dyer, Clerk of the Appellate
second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the case of record in my office.
IN TESTIMONY WHEREOF, I have hereunto set my hand and
seal of the said Appellate Court at Chicago,
this 10th day of February, 1901.
thousand nine hundred and

(446a)

213 I.A. 697

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

EXHIBIT

at the time of the filing of the petition, the opinion of the Court was filed in the office of said Court, in the words and figures

to-wit:

Gen. No. 6557.

Agenda 2.

Robert T. Shaw,

213 I.A. 697

Plaintiff in Error,
-vs-

Error to Circuit Court
LaSalle County.

Charles Dorris, et al.
Defendants in Error.

Nichaus, J.

This suit was commenced in the circuit court of LaSalle County by the plaintiff in error, Robert T. Shaw, a plumbing contractor, against Emanuel M. Davis, and the defendants in error, George Dorris, Thomas Basilion, James Giovanes, and Charles Dorris, co-partners under the name of Charles Dorris & Company, to recover damages for injuries received by falling bricks from the wall of a new building erected by Emanuel M. Davis, a contractor, for said firm of Charles Dorris & Company.

The original declaration, which consists of three counts, states plaintiff in error's cause of action to be substantially as follows:- That the defendants in error and Charles Dorris were the owners of and constructing a certain brick building in the city of Streator on December 20, 1911; that the contract for the construction of this building including the brick work, had been let to Emanuel M. Davis, who, on the day mentioned, was engaged in the construction of the building; and that the contract for the steam heating and plumbing in said building had been let to the plaintiff in error, and that on the day mentioned the plaintiff in error was engaged in carrying out his contract and was putting in the steam heating and plumbing connected therewith. The declaration also avers that it was the duty of the defendants in error to use reasonable care to furnish a reasonably safe place for the plaintiff in

2131.A. 697

Writ of Habeas Corpus
in the County of...

Plaintiff in Error,

-vs-

Charles Morris, et al.
Defendants in Error.

Memorandum.

This writ was commenced in the circuit court of California

County by the plaintiff in error, Robert T. Shaw, a plumbing

contractor, against Emanuel M. Davis, and the defendants in

error, George Morris, Thomas Basilion, James Giovanni, and

Charles Morris, co-partners under the name of Charles Morris &

Company, to recover damages for injuries received by falling

bricks from the wall of a new building erected by Emanuel

Davis, a contractor, for said firm of Charles Morris & Company.

The original declaration, which consists of three counts,

states plaintiff in error's cause of action to be substantially

as follows: - That the defendants in error and Charles Morris were

the owners of and constructing a certain brick building in the

city of Srester on December 20, 1911; that the contract for the

construction of this building including the brick work, had been let

to Emanuel M. Davis, who, on the day mentioned, was engaged in the

construction of the building; and that the contract for the steam

heating and plumbing in said building had been let to the plaintiff

in error, and that on the day mentioned the plaintiff in error was

engaged in carrying out his contract and was putting in the steam

heating and plumbing connected therewith. The declaration also

averts that it was the duty of the defendants in error to use reason-

able care to furnish a reasonably safe place for the plaintiff in

error, and the men in his employ, to work in, in so far as the construction of said building was concerned, outside of putting in the heating and plumbing; and that it was further the duty of said defendants in error to use reasonable care to see to it that the erection of said building was carried on, and the work of those who were erecting the same was so performed, that said premises where the plaintiff in error and those under him were compelled to work would be reasonably safe for him, and those under him, to work in. The declaration further avers that said Emanuel M. Davis, to whom the contract for the construction of the building in question including the brick work had been let, on the day in question was engaged in the construction of said building and was then completing said construction; and that the defendants in error regardless of their duty and neglecting the same, carelessly and negligently allowed and permitted a number of bricks in the construction of said building to be and remain in a loose, dangerous and unstable condition and equilibrium, so that they were liable to fall and precipitate themselves upon the premises immediately below, and that by reason thereof, while the plaintiff in error was then engaged in the performance of his duty, and while in the exercise of all due care and caution for his own safety, and while he was necessarily passing out of a door of the basement of said building, said bricks so insecurely placed and permitted to remain at or near the top of the wall of said building, became dislodged and fell upon the plaintiff in error, severly injuring him. Emanuel M. Davis, as defendant, was dismissed from the case. And thereupon a demurrer was filed by the defendants in error to the declaration which was overruled by the court. Defendants in error then filed a plea of the general issue, and subsequently filed additional special pleas, which in legal effect amounted to the general issue

...and the men in his employ, to work in, in so far as the
construction of said building was concerned, outside of putting in
the heating and plumbing; and that it was in their duty of said
defendants in error to see to it that the
erection of said building was carried on, and the work of those
who were erecting the same was so performed, that said premises
were the plaintiff in error and those under him were compelled to
work would be reasonably safe for him, and those under him, to
work in. The declaration further avers that said Emanuel M. Davis,
to whom the contract for the construction of the building in question
including the brick work had been let, on the day in question was
engaged in the construction of said building and was then completing
said construction, and that the defendants in error regardless of
their duty and neglecting the same, carelessly and negligently
allowed and permitted a number of bricks in the construction of
said building to be and remain in a loose, dangerous and unstable
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by reason thereof, while the plaintiff in error was then engaged
in the performance of his duty, and while in the exercise of all
the care and caution for his own safety, and while he was neces-
sarily passing out of a door of the basement of said building,
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near the top of the wall of said building, became dislodged and
fell upon the plaintiff in error, severely injuring him. Unneces-
sary, as defendant, was dismissed from the case. And thereupon
a demurrer was filed by the defendants in error to the declaration
which was overruled by the court. Defendants in error then filed
a plea of the general issue, and subsequently filed additional
special pleas, which in legal effect amounted to the general issue

and a demurrer there to was sustained. Afterwards, the plaintiff in error, filed an additional count against the defendants in error charging that the plaintiff in error was employed by the defendants in error to do certain work in and about and in connection with the construction of said building, being the installation of the heating apparatus and plumbing, and that on the day of the injury to the plaintiff in error he was engaged in said work in and about said building at the direction of the defendants in error, and that it was then and there the duty of the defendants in error, while he was thus engaged in said service to furnish him a reasonably safe place in which to perform said work in and about said building where such work and service was being performed; that the defendants in error violated their duty in that respect, and failed to provide a safe place in and about said building, and that in consequence thereof and on account of such negligence the plaintiff in error, while necessarily passing out of said building, and while in the exercise of due and ordinary care, was injured by bricks which fell from the walls of said building above the place where the plaintiff in error was so passing out. To this additional count the defendants in error filed the general issue; also a plea of the statute of limitations. The plaintiff in error demurred to the plea of the statute of limitations, and the demurrer was sustained. Thereupon the case went to trial upon the original declaration and the additional count, and the general issue filed to the same. The trial resulted in a verdict for the plaintiff in error, but on motion of the defendants in error, the verdict was set aside and a new trial was granted. Thereupon the court ordered that the order theretofore entered overruling the demurrer to the original declaration be vacated, and the demurrer sustained; and further ordered that the order sustaining the demurrer to the plea of the statute of limitations

... and the man in his employ, in ...
and a demurrer there to was sustained. afterwards, the plaintiff
in error, filed an additional count against the defendants in error
alleging that the plaintiff in error was employed by the defendants
in error to do certain work in and about said building, being the installation of the heating
apparatus and plumbing, and that on the day of the injury to the
plaintiff in error he was engaged in said work in and about said
building at the direction of the defendants in error, and that he was
then engaged in said service to furnish him a reasonably safe place
in which to perform his work in and about said building where such
work and service was being performed; that the defendants in error
violated their duty in that respect, and failed to provide a safe
place in and about said building, and that in consequence thereof
and in neglect of such negligence the plaintiff in error, while
necessarily passing out of said building, and while in the exercise
of his ordinary care, was injured by bricks which fell from the
roof of said building above the place where the plaintiff in error
was so passing out. To this additional count the defendants in
error filed the general issue; also a plea of the statute of limi-
tations. The plaintiff in error demurred to the plea of the statute
of limitations, and the demurrer was sustained. Thereupon the case
went to trial upon the original declaration; and the additional count,
and the general issue filed to the same. The trial resulted in a
verdict for the plaintiff in error, but on motion of the defendants
in error, the verdict was set aside and a new trial was granted.
Thereupon the court ordered that the order theretofore entered
striking the demurrer to the original declaration be vacated,
and the demurrer sustained; and further ordered that the order en-
tering the demurrer to the plea of the statute of limitations

filed to the additional count ne vacated, and that the demurrer be overruled. Plaintiff in error abided by his original declaration, and the defendants in error by their plea of the statute of limitations to the additional count; whereupon the court rendered a judgment in bar, from which judgment this writ of error is prosecuted.

The sustaining of the demurrer to the original declaration and the overruling of the demurrer to the plea of the statute of limitations are assigned as error. It clearly appears from the original declaration and each count thereof that the defendants in error, together with Charles Dorris, as members of the firm of Charles Dorris & Company, were owners of the building in question, which was in process of erection; and that Emanuel M. Davis, who was dismissed from the case had entered into a contract with Charles Dorris & Company for the construction and completion of said building, including the brick work; that he was constructing said building on a location which had been selected by the defendants in error in the city of Streator, according to certain plans furnished him by the defendants in error; that the plaintiff in error, also a contractor, had entered into a contract with Charles Dorris & Company to install steam heating and plumbing in said building; both Davis and the plaintiff in error were independent contractors. No facts are stated in the original declaration from which the inference might be drawn that the defendants in error had any control of the work, that was to be done on said building, or of the men employed by the contractors to do the work; or that the contractor, Davis, was not skillful or competent. These contractors were not working under the direction of the defendants in error, but under their contract, and were in no sense the servants of the owners of the building. The natural inference from the

1
The additional count was not stated, and that the counter-
claimant's error was not stated. Plaintiff in error stated by his original declar-
ation, and the defendants in error by their plea of the statute
of limitations to the additional count; whereas the court rendered
a judgment in favor of the plaintiff from which judgment this writ of error is pre-
sented.

The statement of the counter-claimant to the original declaration
and the overruling of the counter-claimant to the plea of the statute of
limitations are assigned as error. It clearly appears from the
original declaration and each count thereof that the defendants
in error, together with Charles Davis, as members of the firm of
Charles Davis & Company, were owners of the building in question,
which was in process of erection; and that Emanuel M. Davis, who
was dismissed from the case had entered into a contract with
Charles Davis & Company for the construction and completion of
said building, including the brick work; that he was constructing
said building on a location which had been selected by the de-
fendants in error in the city of Worcester, according to certain
plans furnished him by the defendants in error; that the plaintiff
in error, also a contractor, had entered into a contract with Charles
Davis & Company to install steam heating and plumbing in said
building; both Davis and the plaintiff in error were independent
contractors. No facts are stated in the original declaration from
which the inference might be drawn that the defendants in error
had any control of the work, that was to be done on said building,
or of the men employed by the contractors to do the work; or that
the contractor, Davis, was not skillful or competent. The
contractors were not working under the direction of the defendants
in error, but under their contract, and were in no sense the servants
of the owners of the building. The natural inference from the

declaration is, that the general contractor, Davis, used such means and employed such men as he deemed best for the performance of the work which his contract called for. The declaration states a case which is clearly within the general rule, that an owner who lets a contract to erect a building to a competent builder who occupies the relation of an independent contractor to such owner, is not liable for injuries resulting from the negligence of such contractor, or his servants and employees. *Scammon v. City of Chicago*, 25 Ill. 361; *Mercer v. Jackson*, 54 Ill. 397; *Geist v. Rothschild & Co.*, 90 Ill. App. 324.

The obligation of furnishing a safe place to work in, applies only where the relation of master and servant exists. A contract entered into with an independent contractor for the erection of a building does not create this relation. *Jefferson v. James & Morse Co.* 165 Ill. 138.

Inasmuch as the original declaration did not state a cause of action, it was demurrable; and the demurrer was therefore properly sustained to it. The additional count states a new cause of action and bases the ground of recovery upon the relation of master and servant, which in effect it avers existed between the parties at the time of the injury; and it was filed more than two years after the cause of ~~xxx~~ action is alleged to have accrued; a plea of the statute of limitations was therefore a good defense to this count. *Doyle v. City of Sycamore*, 193 Ill. 501. And the demurrer to the plea was therefore properly overruled by the court.

Counsel for the plaintiff in error question the power and propriety of the court's action in going back after the verdict of the jury had been set aside and a new trial granted and setting

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and propriety of the court's action in going back after the verdict
Court for the plaintiff in error question the power

the contractor
denied to the plea was therefore properly overruled by the court.
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of action and bases the ground of recovery upon the relation of
party sustained to it. The additional count states a new cause
of action, it was demurrable; and the demurrer was therefore pro-
assumed as the original declaration did not state a cause

James & Morse Co. 165 Ill. 138.

erection of a building does not create this relation. Jefferson v.
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of the work which his contract called for. The declaration

means and employed such men as he deemed best for the performance
declaration is, that the general contractor, Davis, used such
additional count was

aside the rulings of court previously made in reference to the pleadings. It is clear, however, from the authorities, that the court has such power; moreover, that it is the duty of the court, when it becomes satisfied that an erroneous ruling has been made concerning the sufficiency of a pleading, to set such ruling aside, and correct the error. The fact that the erroneous order was made by another judge is of no consequence, but the power of the trial judge in reference to the matter is precisely the same as if he had made the erroneous ruling himself. "Until final judgment shall be rendered in the suit, the whole record is before the court, and an interlocutory order or judgment may be corrected at any time." *Fort Dearborn Lodge v. Klein*, 115 Ill. 177; *Powie v. Priddle*, 216 Ill. 553; *Cook v. City of Marseilles*, 139 Ill. App. 536; *Merrifield v. Western Cottage Piano Co.* 149 Ill. App. 4; *Carlin v. City of Chicago*, 177 Ill. App. 89; *Mason v. Trent Bros.* 204 Ill. App. 538.

We find no error in the final rulings of the court, and the judgment entered was proper. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

ILLINOIS
DISTRICT

A CERTAINLY that a
entitled cause, in

6592

447a

213 I.A. 698

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. ✓NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6592.

The People &c. ex rel.

Florence Matson. appellee.

213 I.A. 698

va

Appeal from Co. Ct. Henry.

Forrest H. Kermeen, appellant.

Niehaus, J.

This is a prosecution for bastardy, instituted on the complaint of the prosecuting witness, Florence Matson, an unmarried woman, who charged Forrest H. Kermeen, the appellant with being the father of her child, which was born August 14 1917. A jury trial in the county court of Henry County resulted in a verdict, finding the defendant guilty. A motion for a new trial made by the appellant was denied, and judgment was entered against him, in conformity with the statute. From this judgment an appeal is taken.

The principal contention of the appellant is that the verdict is against the weight of the evidence. The prosecuting witness testified, that the appellant commenced keeping company with her in February 1916, and continued to go with her until December 29, 1916, when he became sick; that the appellant had sexual intercourse with her repeatedly and that these intimate relations started in April 1916, and continued to July 24, 1917. That during the month of November 1916, he visited her at least three times a week, and had sexual intercourse with her at each visit; and that she became pregnant in that month between the 9th. and the 16th. and that she became aware of the fact that she had become pregnant not only because her periods stopped, but because of certain physical indications that manifested themselves at that time which she described; that she could tell from these, as well as from the other natural indications, attending pregnancy

2131A. 688

Gen. No. 8235.

The People vs. ex rel.

Florence Watson, defendant.

Appeal from Co. Ct. Henry.

vs

Forrest H. Kermeen, appellant.

Nichols, J.

This is a prosecution for bastardy, instituted on the complaint of the prosecuting witness, Florence Watson, an unmarried woman, who charged Forrest H. Kermeen, the appellant with being the father of her child, which was born August 14, 1917. A jury trial in the county court of Henry County resulted in a verdict, finding the defendant guilty. A motion for a new trial made by the appellant was denied, and judgment was entered against him, in conformity with the statute. From this judgment an appeal is taken.

The principal contention of the appellant is that the verdict is against the weight of the evidence. The prosecuting witness testified, that the appellant commenced keeping company with her in February 1916, and continued to do with her until December 30, 1916, when he became sick; that the appellant had sexual intercourse with her repeatedly and that these intimate relations started in April 1916, and continued to July 30, 1917. That during the month of November 1916, he visited her at least three times a week, and had sexual intercourse with her at each visit; and that she became pregnant in that month between the 27th and the 16th, and that she became aware of the fact that she had become pregnant not only because her periods stopped, but because of certain physical indications that manifested themselves at that time which she described; that she could tell from these, as well as from the other natural indications, attending pregnancy

and gestation; she also testified, that she informed the defendant of her condition, and that he thereupon told her he would marry her; also told her, to get a certain doctor to attend her at child birth, which she did. She also testified that after the defendant recovered from his sickness he went to Chicago, but before going, told her to get her wedding clothes ready, that when he got back, they would be married; that she got ready, but on his return from Chicago he did not marry her as he had promised. The mother of the prosecuting witness corroborated her in the matter of the appellant's visits, and his keeping company with her daughter; and also testified, that after she had ascertained the fact, that her daughter had become pregnant, she had a conversation with the appellant concerning the matter, and asked him if he intended to do the right thing by her daughter, to which he replied "of course I do, when I get where I can." The prosecuting witness, was also corroborated by a sister, who lived at home concerning the matter of appellant keeping company with the prosecuting witness, and his frequent and continued visits at the house; especially during the period when conception must have taken place. And the testimony of the prosecuting witness was corroborated in other minor particulars. The appellant did not testify in his own behalf, and did not deny the facts in relation to his intimacy and intercourse with the prosecuting witness. Under these circumstances it is a reasonable inference, that the testimony of the prosecutrix concerning the intimate relations which had existed between the parties are true. The appellant sought to weaken the force of the testimony against him, by calling two witnesses, who testified they had sexual intercourse with the prosecutrix at different times, before and after the period of time in November 1916,

and testimony, she also testified, that she informed the
 defendant of her condition, and that he thereupon
 told her; also told her to get a certain doctor to
 attend her at child birth, which she did. She also testified
 that after the defendant recovered from his sickness he went
 to Chicago, but before going, told her to get her wedding
 clothes ready, that when he got back, they would be married;
 that she got ready, but on his return from Chicago he did not
 marry her as he had promised. The mother of the prosecuting
 witness corroborated her in the matter of the appeal.
 Also, and his keeping company with her daughter; and also
 testified, that after she had ascertained the fact, that her
 daughter had become pregnant, she had a conversation with the
 defendant concerning the matter, and asked if he intended
 to do the right thing by her daughter, to which he replied
 "of course I do, when I get where I can." The prosecuting
 witness, was also corroborated by a sister, who lived at home
 concerning the matter of appellant keeping company with the
 prosecuting witness, and his frequent and continued visits at
 the house; especially during the period when conception must
 have taken place. And the testimony of the prosecuting witness
 was corroborated in other minor particulars. The appellant
 did not testify in his own behalf, and did not deny the facts
 in relation to his intimacy and intercourse with the pro-
 secuting witness. Under these circumstances it is a reasonable
 inference, that the testimony of the prosecutrix concerning
 the intimate relations which had existed between the parties
 are true. The appellant sought to weaken the force of the
 testimony against him, by calling two witnesses, who testified
 they had sexual intercourse with the prosecutrix at different
 times, before and after the period of time in November 1918,
 as from the other

when the prosecuting witness claimed she became pregnant; one of the witnesses testified, that he had intercourse with her on November 19, 1916. The prosecuting witness denied, that she had intercourse with any person, other than the appellant; and especially denied having intercourse with the witness who had fixed the date of such intercourse specifically on November 19th.; which was very close to the time that the prosecuting witness stated, she had become pregnant. It was a fair question for the jury to determine whether the acts of intercourse testified by the other persons actually took place; and if they did, whether they were really within the period when conception must have taken place. We are of opinion, that the jury were fully warranted from the evidence in finding that the appellant was the father of this child. In weighing the evidence the jury had a right to take into consideration the fact, that the defendant sat silent during the trial, and did not deny the facts testified to, which tended to show that he was the father of the child. The People v Wenglarz, 201 Ill. App. 524. Complaint is also made that the court admitted improper evidence against the defendant on behalf of the people, namely the testimony of the mother of the prosecuting witness, that her daughter asked her questions about her periods stopping, and her testimony heretofore referred to, that she asked the appellant, after her daughters pregnancy, if he intended to do the right thing, and his answer thereto. We are of opinion that the conversation between the mother and the appellant after the daughter's pregnancy was competent, and properly admitted. The conversation between the mother and the daughter concerning her periods, was not objected to, and appellant is therefore not entitled to assign error in it. The court properly excluded the testimony

When the prosecuting witness claimed she became pregnant;
one of the witnesses testified, that he had intercourse
with her on November 18, 1916. The prosecuting witness
testified that she had intercourse with any person, other than
the appellant; and especially denied having intercourse with
the witness who had fixed the date of such intercourse
specifically on November 18th; which was very close to the
time that the prosecuting witness stated, she had become
pregnant. It was a fair question for the jury to determine
whether the date of intercourse testified by the other persons
actually took place; and if they did, whether they were really
within the period when conception must have taken place. We
are of opinion, that the jury were fully warranted from the
evidence in finding that the appellant was the father of
this child. In weighing the evidence the jury had a right to
take into consideration the fact, that the defendant was
absent during the trial, and did not deny the facts testified
to, which tended to show that he was the father of the child.
The People v. Weigman, 201 Ill. App. 324. Complaint is also made
that the court admitted improper evidence against the defendant
on behalf of the people, namely, the testimony of the mother
of the prosecuting witness, that her daughter asked her
questions about her periods stopping, and her testimony
therefore relied to, that she asked the appellant, after
her daughter's pregnancy, if he intended to do the right thing,
and his answer thereto. We are of opinion that the conversa-
tion between the mother and the appellant after the daughter's
pregnancy was competent, and properly admitted. The conversation
between the mother and the daughter concerning her periods, was
not objected to, and appellant is therefore not entitled to
assign error in it. The court properly excluded the testimony

offered with reference to acts of sexual intercourse by the prosecuting witness with other men, not within the period of gestation. *People v Preston*, 122 Ill. App. 93; *Zimmerman v People* 117 Ill. App. 54; *Holcomb v People* 79 Ill. App. 409. Appellant contends that it was error to give the fifth instruction for the people, in which the jury were told, that although they might believe from the evidence that the prosecuting witness had sexual intercourse with another person about or near the time that her bastard child might have been begotten, such fact would not warrant the jury in finding the defendant not guilty if they believed from a preponderance of all the evidence, that the defendant was the father of such bastard child. We think the instruction was properly given, under the facts and circumstances of this case; but it has been repeatedly upheld in cases where the facts and circumstances were similar. *People v Venard* 168 Ill. App. 254; *People v Moore*, 188 Ill. App. 418. Moreover, the instruction must be considered in connection with the fifth instruction given for the appellant, in which the jury were told if they found from the evidence, that any other man or men than the appellant, had sexual intercourse with the prosecuting witness, between October 15, 1916 and November 20, 1916, and that they found from the evidence no other facts or circumstances, to show who was the father of the bastard child, then they must find the appellant not guilty. By the latter instruction the appellant received the full benefit of the legal force of the inferences that might be drawn in his favor, from acts of sexual intercourse by other men which had been testified to. The instructions taken together gave the law to the jury^{as} favorably to the appellant as he was entitled to have it given. We find no error in the record, and judgment is therefore affirmed.

Affirmed.

offered with reference to acts of sexual intercourse by the
first witness with other men, not within the period of
testimony. People v Preston, 188 Ill. App. 33; Zimmerman v
People 117 Ill. App. 54; Holcomb v People 78 Ill. App. 409.

Appellant contends that it was error to give the fifth instruction
for the people, in which the jury were told, that although
they might believe from the evidence that the prosecuting witness
had sexual intercourse with another person about or near the time
that her bastard child might have been begotten, such fact would
not warrant the jury in finding the defendant not guilty if they
believed from a preponderance of all the evidence, that the

defendant was the father of such bastard child. We think the
instruction was properly given, under the facts and circumstances
of this case; but it has been repeatedly upheld in cases where

the facts and circumstances were similar. People v Venable 188
Ill. App. 354; People v Moore, 188 Ill. App. 418. Moreover, the
instruction must be considered in connection with the fifth in-

struction given for the appellant, in which the jury were told
if they found from the evidence, that any other man or woman had
the appellant, had sexual intercourse with the prosecuting wit-
ness, between October 18, 1916 and November 30, 1916, and that

they found from the evidence no other facts or circumstances, to
show, who was the father of the bastard child, then they must
find the appellant not guilty. By the latter instruction the appel-

lant received the full benefit of the legal force of the in-
ference that might be drawn in his favor, from acts of sexual
intercourse by other men which had been testified to. The in-

structions taken together gave the law to the jury. Obviously
to the appellant as he was entitled to have it given. We find
no error in the record, and judgment is therefore affirmed.

Assign error a 33. 7. Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

8-20

in the year of our Lord one thousand nine hundred and
thirty one, the day of the month of May, at the
County of _____ State of _____
I, _____, Clerk of the Court,
do hereby certify that the within and foregoing
is a true and correct copy of the original
as the same appears from the records of the
Court.

6611

(448a)

213 I.A. 698

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. ✓NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6611.

Florence Welcome, appellant.

2131.A. 698

vs

Appeal from McHenry

Thomas Welcome, appellee.

Niehaus, J.

In this case the appellant, Florence Welcome filed a bill for divorce in the circuit court of McHenry County against the appellee, Thomas Welcome. The bill of complaint charges extreme and repeated cruelty; also prays for the custody of the minor child of the parties, and for alimony. There was a hearing before the court concerning the charges in the bill; the court denied the divorce and dismissed the bill; and the appellant prosecutes an appeal to this court from that decree. The principal question involved is, whether the appellant under the evidence adduced in support of her bill is entitled to a divorce. From the testimony of the appellant, it appears, that she was married to the appellee in February 1913; that shortly after the marriage the appellee commenced a course of ill treatment towards her which continued up to the time that she finally left him, which was just prior to the filing of her bill in 1918; that the ill-treatment and acts of cruelty were almost continuous during the time they lived together; that he struck her, kicked her, and abused her in different ways; and that she bore the evidences of these acts of physical violence upon her person at different times, and was compelled to leave him on that account twice before she left him the last time. That she returned to him twice upon his promise not to ill treat her anymore; but that he did not keep his promise.

The parties have one child, a boy who was about five years

2131.A. 688

Appeal from McHenry

Thomas Welcome, appellant.

vs

Thomas Welcome, appellee.

Nebraska, U.

In this case the appellant, Florence Welcome filed a

bill for divorce in the circuit court of McHenry County against the appellee, Thomas Welcome. The bill of complaint

charges extreme and repeated cruelty; also prays for the custody of the minor child of the parties, and for alimony. There was a hearing before the court concerning the charges in the bill; the court denied the divorce and dismissed the

bill; and the appellant prosecutes an appeal to this court from that decree. The principal question involved is, whether

the appellant under the evidence adduced in support of her

bill is entitled to a divorce. From the testimony of the

appellant, it appears, that she was married to the appellee

in February 1918; that shortly after the marriage the appellee commenced a course of ill treatment towards her which continued

up to the time that she finally left him, which was just

prior to the filing of her bill in 1918; that the ill-treatment

and acts of cruelty were almost continuous during the time

they lived together; that he struck her, kicked her, and

abused her in different ways; and that she bore the evidences

of these acts of physical violence upon her person at different times, and was compelled to leave him on that account twice

before she left him the last time. That she returned to him

twice upon his promise not to ill treat her anymore; but that

he did not keep his promise.

The parties have one child, a boy who was about five years

old at the time of the hearing. While the appellee denied at the hearing that he had struck or kicked the appellant at any time, the evidence shows that he admitted to the members of her family on the occasions when he asked his wife to return, that he had ill-treated her, and promised to refrain from doing so thereafter. And the appellant is so strongly corroborated in her testimony of the repeated cruelty treatment received from the appellee, that the proof must be considered as practically conclusive on that point. It is contended by the appellee that the offenses charged against him were condoned, when the appellant returned to him, and resumed her relation as wife; and that the evidence does not show, that he was guilty of any physical violence toward her, after she returned the last time. While the evidence does ~~disclose~~ not disclose any acts of physical violence, it does show that his treatment of the appellant since that time was most unkind and reprehensible. Cruel treatment does not always consist of actual violence; any kind of cruel treatment such as acts of direct unkindness towards a wife are sufficient to do away with the effect of a condonation, and re-establish her right to obtain a divorce on account of previous acts of extreme and repeated cruelty. Sharp v Sharp, 116 Ill. 509. Condonation rests not only upon the condition that the prior offenses are not repeated, but depends as well upon future good usage and conjugal kindness. Brown v Brown, 265 Ill. 546.

We are of opinion, that upon the proof in the record the court should have decreed a divorce, and the decree denying the divorce and dismissing the bill is therefore reversed. And we do not deem it just in the state of the record to remand the case for another hearing, and subject the parties

old at the time of the hearing. While the appellee denied
 at the hearing that he had struck or kicked the appellant at
 any time, the evidence shows that he admitted to the members
 of her family on the occasions when he asked his wife to return
 that he had ill-treated her, and promised to refrain from
 doing so thereafter. And the appellant is so strongly corrob-
 orated in her testimony of the repeated cruelty treatment
 or divorce in the state of Illinois, that the proof must be considered
 received from the appellee, that the proof must be considered
 as practically conclusive on that point. It is contended by
 the appellee that the offense charged against him was con-
 sidered by the court as a crime, and that the evidence does not show, that
 he was guilty of any physical violence toward her, after she
 returned the last time. While the evidence does not show that
 he used any acts of physical violence, it does show that
 his treatment of the appellant since that time was most unkind
 and reprehensible. Cruel treatment does not always consist
 of actual violence; any kind of cruel treatment such as acts
 of threat, insult, or abuse, is sufficient to constitute
 of threat unkindness towards a wife are sufficient to do
 away with the effect of a cohabitation, and re-establish her
 right to obtain a divorce on account of previous acts
 of extreme and repeated cruelty. *Sharp v Sharp*, 116
 Ill. 308. Cohabitation rests not only upon the condition that
 the prior offenses are not repeated, but depends as well upon
 future good usage and conjugal kindness. *Brown v Brown*, 285
 Ill. 546.
 We are of opinion, that upon the proof in the record
 before the court, that the appellant has been treated as well upon
 the divorce and that the bill is therefore reversed.
 And we do not deem it just in the state of the record to
 remand the case for another hearing, and subject the parties

to the scandal, annoyance and expense of another trial, but that a divorce can and should be decreed upon the evidence in the record. The cause is therefore remanded with directions to grant the appellant a divorce from the appellee; and to hear and determine the matters of alimony and solicitor's fees and questions pertaining to the custody of the child, in accordance with the rights and obligations of the parties.

Reversed and remanded with directions.

to the fact that the evidence is not sufficient to establish that a divorce was granted by the court. The court is therefore bound to grant the appeal and to set aside the decree of divorce and to restore the status of the parties to that which it was before the divorce was granted. The court is therefore bound to grant the appeal and to set aside the decree of divorce and to restore the status of the parties to that which it was before the divorce was granted.

Reversed and remanded with directions.

The court is therefore bound to grant the appeal and to set aside the decree of divorce and to restore the status of the parties to that which it was before the divorce was granted. The court is therefore bound to grant the appeal and to set aside the decree of divorce and to restore the status of the parties to that which it was before the divorce was granted.

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STATE OF ILLINOIS,
SECOND DISTRICT.

SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

OF ILLINOIS
ONE DISTRICT
and Second District of the
CERITITY and

6619

(449a)

213 I.A. 698

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6619.

F. J. Gerretsen, appellee

213 I.A. 698

vs

Appeal from Lake.

H. A. Meyer, appellant.

Niehaus, J.

This is an appeal from a judgment for \$100 recovered by the appellee F. J. Gerretsen, in the circuit court of Lake county against the appellant H. A. Meyer. The suit was commenced by the appellee before a justice of the peace, where a trial was had, and a judgment entered for the appellee for \$100, from which an appeal was taken to the circuit court; and a trial de novo, resulted in a verdict and judgment for the same amount; and from this judgment an appeal is taken. The appellee brought this suit to recover back the purchase price of a motor boat, which the appellant had sold to the appellee under a warranty which he claimed had been broken. The appellee was engaged in the fishing business, and in September 1914, was looking for a boat to be used for the needs of his business; and he went to see the appellant, who was engaged in building, repairing, and the storing of boats. Appellant told him, that he had just what he wanted; that he had a hull and an old engine that belonged to Mr. Pratt, but had been left with him for sale. Appellee testified, that the appellant told him that he would put the engine into the hull, and fix it up in good shape, so that it would run all right; that after he got it fixed up, he would guarantee the boat to be the best on the lake; that it would go and come; and that he would put up the boat in this way for \$100 and guarantee that it would run, and everything would be in good shape; that if it didnt run perfectly, he would give him his money back; that he accepted the appellanys proposal, and in that way purchased the boat; and under the warranty stated. The appellant fixed up the

Gen. No. 6813.

2131A.888

F. J. Gerstman, appellee

Appeal from Lake.

vs

H. A. Meyer, appellant.

Michigan, J.

This is an appeal from a judgment for \$100 recovered by the appellee F. J. Gerstman, in the circuit court of Lake County against the appellant H. A. Meyer. The suit was commenced by the appellee before a Justice of the Peace, where a trial was had, and a judgment entered for the appellee for \$100, from which an appeal was taken to the circuit court, and a trial is now, resulted in a verdict and judgment for the same amount; and from this judgment an appeal is taken. The appellee brought this suit to recover back the purchase price of a motor boat, which the appellant had sold to the appellee under a warranty which he claimed had been broken. The appellee was engaged in the fishing business, and in September 1914, was looking for a boat to be used for the needs of his business; and he went to see the appellant, who was engaged in building, repairing, and the storing of boats. Appellant told him, that he had just what he wanted; that he had a hull and an old engine that belonged to Mr. Pratt, but had been left with him for sale. Appellee testified, that the appellant told him that he would put the engine into the hull, and fix it up in good shape, so that it would run all right; that after he got it fixed up, he would guarantee the boat to be the best on the lake; that it would go and come; and that he would put up the boat in this way for \$100 and guarantee that it would run and everything would be in good shape; that if it didn't run perfectly, he would give him his money back; that he accepted the appellant's proposal, and in that way purchased the boat; and under the warranty stated. The appellant fixed up the

boat, and delivered it to the appellee, and the appellee gave him his note for \$100. which note was subsequently paid in two payments of \$50 each. The appellee tried to use the boat in connection with his fishing business, but had continual trouble with it; the engine, and the mechanisms connected with it, often failed to work; sometimes there was trouble with the wiring connected with the batteries; sometimes one of the cylinders would stop running; or the "make and break" mechanism got out of order; sometimes there was something wrong with the stuffing box; and on that account the boat was repeatedly returned to the appellant, who would then attempt to remedy the difficulty; the appellant himself admitted, that upon one of those occasions he worked on the engine about six hours, in trying to get it in running order. The evidence is clear, that notwithstanding the repeated efforts of the appellant to get the boat in condition to run properly, he never fully succeeded. When the boat returned to the appellant the last time, he had it taken to his premises, where it has since remained.

The appellee also testified, that after the boat was last returned to the appellant, he went to see him and asked him what he was going to do about it, and said to him "you aren't treating me right, you know the boat isn't running, and you know what you said about refunding the money," and that the appellant thereupon replied, "I will make the boat run or refund your money." But that the appellant never put the boat in running order for him, and that he never heard anything more from him; but when he went out to look at it later, it was sunk in the lake. The appellee thereafter wrote the appellant a letter demanding, that he put the boat in an acceptable condition or refund the \$100 paid for the same. Appellant paid no attention to the letter or demand, and thereupon the appellee brought suit.

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him his note for \$100. which note was subsequently paid in two
payments of \$50 each. The appellee tried to use the boat in
connection with his fishing business, but had continual trouble
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wiring connected with the batteries; sometimes one of the cy-
linders would stop running; or the "leak and press" mechanism
got out of order; sometimes there was something wrong with the
steering box; and on that account the boat was repeatedly re-
turned to the appellant, who would then attempt to remedy the
defect; the appellee himself admitted that upon several
occasions he worked on the engine about six hours, in
trying to get it in running order. The evidence is clear, that
notwithstanding the repeated efforts of the appellant to get
the boat in condition to run properly, he never fully succeeded.
The boat returned to the appellee the last time, he had
it taken to his premises, where it has since remained.
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returned to the appellant, he went to see him and asked him what
he was going to do about it, and said to him "you aren't treating
me right, you know the boat isn't running, and you know what you
said about refunding the money." and that the appellant thereupon
replied, "I will make the boat run or refund your money." But
that the appellee never got the boat in running order for him,
and that he never heard anything more from him; but when he
went out, to look at it later, it was sunk in the lake. The ap-
pellee thereafter wrote the appellant a letter demanding, that
he put the boat in an acceptable condition or refund the \$100
paid for the same. Appellant paid no attention to the letter
or demand, and thereupon the appellee brought suit, and there-
upon the appellant filed a motion to dismiss the same.

While the appellant denies, that he made the warranty as testified to by the appellee, he admits, that he told him that it was his belief, that the Pratt engine was in good shape; that he would put it in the boat, and that they could take it and try it out; and that if he didnt want to keep it, he could return the boat and get the money back. Under a warranty such as is testified to by the appellee, and an agreement to return the purchase price, in case the article purchased does not come up to the requirements of the warranty, and is returned by the purchaser, the purchaser has the right to sue and recover back the purchase price. *Dallum v Birdsal*, 66 Ill. 378.

It is contended by the appellant that the appellee after trying out the boat, and finding, that it did not run properly, should have immediately returned it, in order to put himself in position to recover the money which the appellant promised to refund; and that keeping the boat for an extended period of time, after he had found that it would not run properly, must be regarded an acceptance of the boat; and that therefore he has no legal right to recover the purchase price. The evidence however justifies the inference, that the appellee kept the boat, and also paid the purchase price, under the assumption, that the appellant would finally get the boat in proper running condition; so that the appellee could get a proper use of the boat. Under these circumstances the delay in returning cannot be regarded as an absolute acceptance. *Sandwich Mfg. Co. v Kelley* 26 Ill. App. 394; *Henkins v Miller* 45 Ill. App. 34; *Crabtree v Po'ts* 108 Ill. App. 637.

Of course it was a question, whether or not the appellant made the warranty claimed by the appellee, and whether or not appellant finally did put the boat in good running condition; and these were questions of fact, which it was the province of the jury to determine, and they determined them against

While the appellant denies, that he made a warranty, as testified to by the appellee, he admits, that he told him that it was his belief, that the Pratt engine was in good shape; that he would put it in the boat, and that they could take it and try it out; and that if he didn't want to keep it, he could return the boat and get the money back. Under a warranty such as is testified to by the appellee, and an agreement to return the purchase price, in case the article purchased does not come up to the requirements of the warranty, and is returned by the purchaser, the purchaser has the right to sue and recover back the purchase price. *Belum v. Birdsell*, 88 Ill. 378.

It is contended by the appellant that the appellee after trying out the boat, and finding, that it did not run properly, should have immediately returned it, in order to put himself in position to recover the money which the appellant promised to return; and that keeping the boat for an extended period of time, after he had found that it would not run properly, was regarded as acceptance of the boat; and that therefore he has no legal right to recover the purchase price. The evidence however justifies the inference, that the appellee kept the boat, and also paid the purchase price, under the assumption, that the appellant would finally get the boat in proper running condition; so that the appellee could get a proper use of the boat. Under these circumstances the delay in returning cannot be regarded as an absolute acceptance. *Randolph Mfg. Co. v. Kelley* 86 Ill. App. 384; *Hennings v. Miller* 45 Ill. App. 34; *Gratfree v. Fort* 108 Ill. App. 637.

Of course it was a question, whether or not the appellant made the warranty claimed by the appellee, and whether or not appellant finally got the boat in good running condition; and these were questions of fact, which it was the province of the jury to decide, and the court should not have

the appellant. This court would not be warranted in saying that the finding of the jury in that regard is manifestly against the weight of the evidence.

The point is also made, that inasmuch as a prior suit was instituted by the appellant before a justice of the peace, for the recovery of a part of the purchase money, that appellee should at that time have made defense thereto, and contested the right of the appellant to recover, if there was a breach of warranty as claimed by him; and that inasmuch, as he did not set up such a defense in that suit, it is now barred. The record however, fails to disclose, that there was any trial or adjudication of the rights of the parties in the case commenced before the justice. The mere commencement of this suit, cannot be considered as res adjudicata of the contested matters involved in this case. It is apparent from the record, that this is the only suit in which the rights of the parties involved in the controversy, have really been adjudicated. If the appellee's version, as testified to by him of the sale, warranty, and final disposition of the boat, is the true one, and the jury found that it was, then he had a legal right to sue for, and recover back, the amount which he paid for the boat. The record does not disclose any error, and the judgment is therefore affirmed.

Affirmed.

that the appellant. This court would not be warranted in saying that
the finding of the jury in this regard is manifestly against
the weight of the evidence. The point is also made, that as much as a trial was
instigated by the appellant before justice of the peace, for
the recovery of a part of the purchase money, that appellant
should at that time have made defense, honest, and competent
the right of the appellant to a recovery of the money was proper.
It is further stated by him, and that inasmuch as he did
not set up such a defense in that suit, that it is now barred. The
court, however, fails to disclose that there was any trial or
adjudication of the rights of the parties in the case commenced
before the justice. The mere commencement of this suit cannot
be held to be a bar to the recovery of the money, as the parties involved
in this case. It is also stated from the record, that this is the
only suit in which the rights of the parties involved in the
case have been adjudicated. If the appellant
was, as testified to by him of the sale, warranty, and final
disposition of the boat to the true one, and the jury found
that it was, then he had a legal right to sue for, and recover
back, the amount which he paid for the boat. The record does
not disclose any error, and the judgment is therefore affirmed.
Affirmed.

Kelly vs. Kelly, 26 Ill. App.

2d 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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appellant's liability

and these were the

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6822

(450a)

213 I.A. 698

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

100

the first day of October, and nine hundred and eighty

Presiding Justice.

Justice.

Justice.

By the Court, the opinion of the Court was filed in

that afterwards, to-wit: on
the 19th day of October, 1910, the opinion of the Court was filed in
the office of said Court, in the words and figures
following, to-wit:

Gen. No. 6632.

Charles S. Cullen and Lewis
Gowen, partners doing business
as Cullen & Gowen. appellees.

213 I.A. 698

vs

Appeal from LaSalle.

Burton S. Jordan, appellant.

Niehaus, J.

In this case the appellees, Charles S. Cullen and Lewis Gowen, co-partners under the firm name of Cullen & Gowen filed a bill in equity in the circuit court of LaSalle County to enjoin the appellant Burton S. Jordan who was their tenant from tearing out or removing or in any way injuring the front of a picture theatre in the city of Ottawa known as the Orpheum Theatre; and from removing or injuring the partitions, lobby doors, ticket office, operating booths or electric wiring and fixtures therein. A temporary injunction was ordered and issued in conformity with the prayer of the bill, and this was made permanent upon the final hearing of the case. After filing his answer to the bill of complaint, the appellant made a motion to dissolve the injunction, but the court took the motion under advisement, and reserved his decision thereon until the final hearing, when it was in effect denied, by the order making the injunction permanent.

The proof shows that the premises involved in this controversy is a three story brick building located in the business district of the city of Ottawa, on the corner of Jefferson and LaSalle streets; it contained two store rooms on the ground floor, which prior to appellant's tenancy had been fitted for, and used as salesrooms, for the ordinary and usual retail trade. On June 1st. 1911, the appellant and Frank P. Tuttle leased one of the store rooms from the appellees for

2131.A.698

Appeal from Lesalle.

Charles S. Gullen and Lewis
Gowen, partners doing business
as Gullen & Gowen, appellants,
vs
Burton S. Jordan, appellant.

Michigan, 1.

In this case the appellees, Charles S. Gullen and
Lewis Gowen, co-partners under the firm name of Gullen & Gowen,
filed a bill in equity in the circuit court of Lesalle County
to enjoin the appellant Burton S. Jordan who was their tenant
from tearing out or removing or in any way injuring the front
of a picture theatre in the city of Ottawa known as the Orpheum
Theatre; and from removing or injuring the partitions, lobby
boxes, ticket office, operating booths or electric wiring and
fixtures therein. A temporary injunction was ordered and issued
in conformity with the prayer of the bill, and this was made
permanent upon the final hearing of the case. After filing his
answer to the bill of complaint, the appellant made a motion to
dissolve the injunction, but the court took the motion under
advisement, and reserved his decision thereon until the final
hearing, when it was in effect denied, by the order making the
injunction permanent.

The proof shows that the premises involved in this
controversy is a three story brick building located in the
business district of the city of Ottawa, on the corner of
Jefferson and Lesalle streets; it contained two store rooms on
the ground floor, which prior to appellant's tenancy had been
fitted for, and used as salarooms, for the ordinary and usual
retail trade. On June 1st, 1911, the appellant and Frank P.
Tuttle leased one of the store rooms from the appellees for

the purpose of converting the same into a moving picture theatre. A written lease was entered into by the parties; the term of the lease was one year from the date mentioned, and gave to the lessees the option to extend the lease upon the same terms for another period of one, two or three years, as the lessees should elect, by giving thirty days ~~tim~~ notice before the expiration of said lease of their intention to have it renewed. Before the expiration of the year, and more than thirty days prior thereto, the lessees notified the lessors, that they had elected to renew the lease upon the same terms, for the additional period of three years; and thereupon in compliance with such election a written renewal lease was drawn up and duly executed, dated June 1st. 1913, which extended the term for three years more, namely to May 31st. 1915. The original lease, as well as the renewal lease provided that the lessees should have the right to remove any and all property by them put in the building, no matter how it was attached thereto, at the expiration of the term of the lease. After taking possession under the original lease, the lessees proceeded to remodel the store room to make it suitable, convenient and attractive for the purpose for which ~~it was leased~~ they leased it, namely, a picture show theatre; and constructed an ornamental front consisting of arches, made of lath, plaster wood and moulded decorative plaster; they also constructed wood and plaster partitions, made a lobby, and built a ticket office; and an operator's room with a fire proof steel booth made in steel sections and bolted together upon an iron frame but constructed in such a way that it could be readily taken down; they built swinging doors in the partitions for entrance and exit; and a number of other things to make the front attractive, theatre-like, and usable for the picture show business; at the rear end of the room, they built a partition

the purpose of converting the same into a moving picture theatre. A written lease was entered into by the parties; the term of the lease was one year from the date mentioned, and gave to the lessees the option to extend the lease upon the same terms for another period of one, two or three years, as the lessees should elect, by giving thirty days notice before the expiration of said lease of their intention to have it renewed. Before the expiration of the year, and more than thirty days prior thereto, the lessees notified the lessors, that they had elected to renew the lease upon the same terms, for the additional period of three years; and thereupon in compliance with such election a written renewal lease was drawn up and duly executed, dated June 1st, 1912, which extended the term for three years more, namely to May 31st, 1915. The original lease, as well as the renewal lease provided that the lessees should have the right to remove any and all property by them put in the building, no matter how it was attached thereto, at the expiration of the term of the lease. After taking possession under the original lease, the lessees proceeded to remodel the store room to make it suitable, convenient and attractive for the purpose for which it was leased; they leased it, namely, a picture show theatre; and constructed an ornamental front consisting of arches, made of lath, plaster wood and moulded decorative plaster; they also constructed wood and plaster partitions, made a lobby, and built a stock office; and an operator's room with five proof steel booth in steel sections and bolted together upon an iron frame but constructed in such a way that it could be readily taken down; they built swinging doors in the partitions for entrance and exit; and a number of other things to make the front attractive, theatre-like, and suitable for the picture show business; at the rear end of the room, they built a partition

screen, used in connection with the exhibition of pictures; this was built of studding nailed to strips or cleats and attached to the floor and ceiling and was covered with lath and plaster; they also put in a number of electric wires which were strung along the joice in the basement upon spool insulators held in place with screws; and in other parts of the room the wires were put in the ornamental construction work put up by the lessees. After the room in question had been suitably remodeled, and fixed up with the necessary equipment a public theatre was conducted therein until shortly before the filing of the bill herein. On June 13, 1913, which was shortly after the renewal of the original lease, the appellant bought out the interest of Tuttle in the business and in the lease hold, and the appliances and property owned by them, and they were transferred and assigned to appellant; he thereby became the sole owner and lessee; and thereafter the picture show was managed and conducted and controlled by him. Upon a final hearing of this case, the court rendered a decree, which is appealed from, which enjoins the appellant from removing the ~~decorative~~ decorative arches, and from removing the partitions and the swinging doors attached to the same; and ticket office; also from removing the operating rooms above the ticket office; also from removing the lobby the ceiling of which consisted of arches covered with lath and plaster; and all the partition walls, including the partition wall at the west end of the building which was built as a screen, and which was nailed to the floor and ceiling; and restrained from removing the decorative front, and the electric wiring. All the property and fixtures which the decree restrains the appellant from removing is property which had been put in the building by the lessees for the purpose of

screen, used in connection with the exhibition of pictures;
this was built of studding nailed to strips of plate and
attached to the floor and ceiling and was covered with
and plaster; they also put in a number of electric wires which
which were strung along the joists in the basement upon spool
holders held in place with screws; and in other parts of
the room the wires were put in the ornamental construction
and put up by the lessee. After the room in question had
been thoroughly remodeled, and fixed up with the necessary equip-
ment a public theatre was conducted therein until shortly be-
fore the filing of the bill herein. On June 15, 1913, which
was shortly after the renewal of the original lease, the
applicant bought out the interest of Tuttle in the business
and the lease hold, and the appliances and property owned
by them, and they were transferred and assigned to applicant;
he thereby became the sole owner and lessee; and thereafter
the theatre show was managed and conducted and controlled by
him. Upon a final hearing of this case, the court rendered a
decree, which is appealed from, which enjoins the applicant
from removing the various decorative arches, and from re-
moving the partitions and the swinging doors attached to the
stage, and ticket office; also from removing the operating
rooms above the ticket office; also from removing the lobby
and ceiling of the theatre; and from removing the
partition wall at the west end of the building which was built
as a screen, and which was nailed to the floor and ceiling;
and restrained from removing the restrictive front, and
the electric wiring. All the property and fixtures which
decree restrains the applicant from removing is property which
had been put in the building by the lessee for the purpose of
business; and

3

their business, and which under the express provisions of the lease referred to he had reserved the right to remove, no matter how attached to the building.

Appellees contend that the improvements and fixtures in question cannot be removed without largely destroying them because they would have to be taken apart, and this would destroy their identity, and value as improvements. But this is a matter concerning which the landlord has no right to complain, if the tenant has the right to remove the same. *Baker v McClurg* 198 Ill. 36. Nor does it appear that the removal of the property and fixtures in question would work any substantial injury to the building. Outside of knocking off a few feet of plaster from the walls, and leaving nail holes in the ceilings, and floors, and in the places where the partitions and construction work was attached to the building, all of which can be repaired at a small cost, no injury will result from the removal of the property in question. It clearly appears from the evidence too, that all the improvements were made by the lessees with a view of detaching them at the end of the lease hold term.

We are of opinion, that the appellant under the terms of the lease, and under the law, has the right to remove the property fixtures in question; and that it was error to restrain him from so doing. The decree is therefore reversed, and the cause is remanded with directions to dissolve the injunction, and dismiss the bill for want of equity.

Reversed and remanded with directions.

their business, and which under the express provisions of the lease referred to, had reserved the right to remove, after now attached to the building.

Appellees contend that the improvements and fixtures in question cannot be removed without largely destroying them, and that they would have to be taken apart, and this would destroy their identity, and value as improvements. But this is a matter concerning which the landlord has no right to complain. If the tenant has the right to remove the same. Baker v. McGloughlin, 125 Ill. 381. Nor does it appear that the removal of the improvements, and fixtures in question would work any substantial injury to the building. Aside of knocking off a few feet of plaster from the walls, and leaving nail holes in the ceilings, and floors, and in the places where the partitions and construction work was attached to the building, all of which can be repaired at a small cost, no injury will result from the removal of the property in question. It clearly appears from the evidence too, that all the improvements were made by the lessee with a view of detaching them at the end of the lease hold term.

It is of opinion, that the appellant under the terms of the lease, under the law, has the right to remove the property fixtures in question; and that it was error to reverse the decree in this respect. The decree is therefore reversed, and the cause is remanded with directions to dissolve the injunction, and dismiss the bill for want of equity.

Reversed and remanded with directions.

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... had been put in the ...

STATE OF ILLINOIS,
SECOND DISTRICT.

SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

14

14

Witness my hand and seal this 14th day of June 1904

1904

14

NOTARY PUBLIC

or said Record District of the State of Texas
I do CERTIFY that the foregoing is a
true and correct copy of the record as the same
is on file in the office of the County Clerk of said County

Notary

Notary

Notary

6638

(451a)

2131.A. 698

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

2131.A. 001

OF A TERM OF THE APPELLATE COURT,

Presiding Justice.

Justice.

Justice.

Clerk.

opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures

Gen. No. 6638

S. Musgove et al, appellees.

213 I.A. 698

vs Appeal from Henderson.

C. B. & Q. R. R. Co. appellant.

Niehaus, J.

This suit was commenced in the Circuit Court of Henderson County by the appellees, Spurgeon Musgove, S. A. Shields and David Cocver, co-partners under the firm name of Musgove, Shields & Company, to recover damages from the appellant Chicago, Burlington & Quincy Railroad Company. The appellees allege, that they suffered damages by unreasonable delay in the transportation of three carloads of cattle over appellants railroad, from Oquawka to Chicago. The cattle were shipped from Oquawka about five P. M. on May 22, 1917 on a freight train known as No. 91, and arrived at Chicago Stock Yards about 5:30 P. M. the next day which appellees claim was about seven hours later than they should have arrived and too late for the market for that day; as a necessary consequence the cattle could not be sold until the next day; and in the meantime a drop occurred in the market price of cattle; so that the appellees received 25¢ per hundred weight less than they would have received if they had been able to sell on the previous day. Appellees also claim, that some damage was caused by shrinkage in the weight of the cattle, occasioned by the cattle being kept in the cars longer than was necessary by the alleged delay in the transportation.

There was a trial by jury which resulted in a verdict and judgment against the appellant for \$302.93; from this judgment an appeal is prosecuted.

It is established by the evidence that the appellant.

S. Masgove et al, appellees.

Appeal from Henderson.

vs

C. E. & O. R. R. Co. appellant.

Writings, 1.

This suit was commenced in the Circuit Court of

Henderson County by the appellees, Spurgeon Masgove, S. A.

Shields and David Cover, co-partners under the firm name of

Masgove, Shields & Company, to recover damages from the appellant

Chicago, Burlington & Quincy Railroad Company. The appellees

allege, that they suffered damages by unreasonable delay in

the transportation of three carloads of cattle over appellants

railroad, from Oquawka to Chicago. The cattle were shipped

from Oquawka about five P. M. on May 28, 1917 on a freight train

known as No. 91, and arrived at Chicago Stock Yards about

5:30 P. M. the next day which appellees claim was about

seven hours later than they should have arrived and too late

for the market for that day; as a necessary consequence

the cattle could not be sold until the next day; and in the

meantime a drop occurred in the market price of cattle;

so that the appellees received 35¢ per hundred weight less than

they could have received if they had been able to sell on the

previous day. Appellees also claim, that some damage was

caused by shrinkage in the weight of the cattle, occasioned by

the cattle being kept in the cars longer than was necessary by

the alleged delay in the transportation.

There was a trial by jury which resulted in a verdict

and judgment against the appellant for \$302.93; from this

judgment an appeal is prosecuted.

It is established by the evidence that the appellant.

operates a line of railroad in this state, the main line of which runs between Burlington and Chicago; that there is a branch line forming a sort of triangle, running from Gladstone on the main line through Oquawka to a certain point north; and from this point easterly to Galva, which is also on the main line. This branch is operated both ways in the transportation of freight and live stock in connection with the main line. At the time the matters in controversy arose two freight trains were regularly operated by the appellant on the branch line in connection with the transportation of live stock, as well as other freight from Oquawka to Chicago. One train was known as No. 91; and this train started at Galva, ran west, and then south over the branch line through Oquawka to Gladstone, and then to Burlington; the other train known as No. 92 started at Burlington; running from there to Gladstone; and then north on the branch line through Oquawka and on to Galva; and from there to Chicago. Train No. 92 was run with special reference to a speedy transportation of live stock to Chicago. Train No. 91 was operated as a local and way freight; and its particular function in the transportation business of appellant, was to distribute merchandise received from the main line at Galva to the stations, about ten in number, located along the branch line; but it was also utilized to distribute stock cars and coal cars, and to spot cars at loading chutes, where they could be loaded with cattle for shipment to Chicago; in addition to this business, it had the switching work to do, which was incidental to the business of way freight trains at the various stations. There were two trains regularly in operation on the main line, which were run for the transportation of live stock in connection with train No. 91.

operates a line of railroad in this state, the main line of which runs between Burlington and Chicago; that there is a branch line forming a sort of triangle, running from Gladstone on the main line through Odawka to a certain point north; and from this point easterly to Galva, which is also on the main line. This branch is operated both ways in the transportation of freight and live stock in connection with the main line. At the time the matters in controversy arose two freight trains were regularly operated by the applicant on the branch line in connection with the transportation of live stock, as well as other freight from Odawka to Chicago. One train was known as No. 91; and this train started at Galva, ran west, and then south over the branch line through Odawka to Gladstone, and then to Burlington; the other train known as No. 92 started at Burlington; running from there to Gladstone; and then north on the branch line through Odawka, and on to Galva; and from there to Chicago. Train No. 92 was run with special reference to a speedy transportation of live stock to Chicago. Train No. 91 was operated as a local and way freight; and its particular function in the transportation business of applicant, was to distribute merchandise received from the main line at Galva to the stations, about ten in number, located along the branch line; but it was also utilized to distribute stock cars and coal cars, and to spot cars at loading chutes, where they could be loaded with cattle for shipment to Chicago; in addition to this business, it had the switching work to do, which was incidental to the business of way freight trains at the various stations. There were two trains regularly in operation on the main line, which were run for the transportation of live stock in connection with train No. 91.

One train was designated as a "stock pick up" train, and was scheduled to leave Burlington daily for Chicago about 5:40 P. M. and in its regular run this train picked up cars of stock, including any which might be left at Gladstone by Train No. 91, and took them to Galesburg, where they would be transferred to another train directly bound for the Union Stock Yards at Chicago. If train No. 91 did not reach Gladstone in time for the pick up stock train, then any cars of stock which it carried in the regular course of business would be taken by the next train which was known as No. 70. This train left Burlington daily at 1:00 A. M. and usually arrived at the stock yards in Chicago about 5:00 P. M. the same day. In this case the appellees shipped their cattle on train No. 91, which in this instance did not get to Gladstone in time to make connection with the "stock pick up" train; hence the cars of cattle shipped were taken by the next regular train, which was No. 70.

The evidence clearly shows that the appellees were well informed of the time, and the conditions under which the trains were operated; in fact they were expressly notified by the appellant, some time before the shipment in question was made, that if they shipped cattle on train No. 91 instead of on the regular stock train, which was train No. 92 they might not reach Chicago as soon; inasmuch as Train No. 91 because of its varied and many tasks could not be relied on to take cattle cars to Gladstone in time to have them taken to Chicago by the "pick up ~~xxxxx~~ stock" train; and that therefore if they wanted to make certain the earlier arrival of their cattle at Chicago, they should avail themselves of train No. 92 to ship their stock. Having this notice and knowledge, the appellees chose to send their cattle by train No. 91; and under the circumstances are not in position to complain,

One train was designated as a "stock pick up" train, and was scheduled to leave Burlington daily for Chicago about 5:00 P. M. and in its regular run this train picked up cars of stock, including any which might be left at Gladstone by train No. 91, and took them to Salesburg, where they would be transferred to another train directly bound for the

Union Stock Yards at Chicago. If train No. 91 did not reach Gladstone in time for the pick up stock train, then any cars of stock which it carried in the regular course of business would be taken by the next train which was known as No. 90.

This train left Burlington daily at 1:00 A. M. and usually arrived at the stock yards in Chicago about 5:00 P. M. the same day. In this case the appellees shipped their cattle on train No. 91, which in this instance did not get to Gladstone in time to make connection with the "stock pick up" train; hence the cars of cattle shipped were taken by the next regular train, which was No. 90.

The evidence clearly shows that the appellees were well informed of the time, and the conditions under which the trains were operated; in fact they were expressly notified by the appellant, some time before the shipment in question was made, that if they shipped cattle on train No. 91 instead of on the regular stock train, which was train No. 90, they might not reach Chicago as soon; inasmuch as train No. 91 because of its varied and many tasks could not be relied on to take cattle cars to Gladstone in time to have them taken to Chicago by the "pick up ~~xxxxxx~~ stock" train; and that therefore if they wanted to make certain the earlier arrival of their cattle at Chicago, they should avail themselves of train No. 90. The appellees chose to send their cattle by train No. 91; and under the circumstances are not in position to complain.

because they did not get their cattle to Chicago earlier. The record does not contain any evidence of unreasonable delay. Nor is there any negligence shown on the part of appellant's employees which caused any delay. The delay necessarily incident to the transaction of the ordinary and usual business of a freight train cannot be regarded as unreasonable. The rule concerning the legal obligations of a common carrier in the transportation of freight is precisely stated in *Bacon v C. C. & St. L. Ry. Co.* 155 Ill. App. 40. as follows: "A common carrier is bound to deliver goods without unreasonable delay, but the failure of a common carrier to deliver goods within a reasonable time involves a consideration of the question of negligence by the carrier; and a delay however long cannot be said to be unreasonable if the carrier can show, that it was free from any negligence which contributed to such delay." *Illinois Central R. R. Co. v McClellan* 54 Ill. 70; *Michigan Central R. R. Co. v Curtis* 80 Ill. 334; *Adams Ex. Co. v Bratton*, 106 Ill. App. 563; *Wabash R. R. Co. v Johnson*, 114 Ill. App. 545.

Applying this rule to the proof in this case, it is clear that the appellees have no cause of action based upon unreasonable delay in transportation; the judgment is therefore reversed.

Reversed.

Finding of facts to be incorporated in the judgment. We find that there was no unreasonable delay in the transportation of the cattle in question.

The record does not contain any evidence of unreasonable delay. It is there any negligence shown on the part of appellant's employees which caused any delay. The delay necessarily

incident to the transaction of the ordinary and usual business of a freight train cannot be regarded as unreasonable. The rule concerning the legal obligations of a common carrier in the transportation of freight is precisely stated in Bacon v. C. C. & St. L. Ry. Co., 155 Ill. App. 40.

"A common carrier is bound to deliver goods without unreasonable delay, but the failure of a common carrier to deliver goods within a reasonable time involves a consideration of the question of negligence by the carrier; and a delay however long cannot be said to be unreasonable if the carrier can show that it was free from any negligence which contributed to such delay." Illinois Central R. R. Co. v. McCallan, 54 Ill. 70; Michigan Central R. R. Co. v. Curtis, 53 Ill. 324; Adams Ex. Co. v. Bratton, 108 Ill. App. 563; Western R. R. Co. v. Johnson, 114 Ill. App. 545. Applying this rule to the proof in this case, it is clear that the appellees have no cause of action based upon unreasonable delay in transportation; the judgment is therefore reversed.

Reversed.

It is further ordered that the costs of this appeal be paid by the appellant.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6644

452a
213 I.A. 698

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
February 8, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6644

213 I.A. 698

Carl E. Botsford, appellee.

vs

Appeal from City Court Elgin.

City of Elgin, appellant.

Niehaus, J.

In this case the appellant Carl E. Botsford sued the city of Elgin to recover damages which he alleges he suffered because the city in making a certain local improvement namely paving Division street, in the city of Elgin, cut down the grade of the street so as to cut off ingress and egress to and from his property which fronted on the street. There was a trial by jury and a verdict and judgment for appellee for \$3000; this appeal is prosecuted from that judgment.

The questions involved in this appeal and the errors assigned and argued are the same as in the case of Louise A Botsford v City of Elgin, Gen. No. 6643, ^(Case No. 4515) in which an opinion has been filed at the present term. For the reasons stated in the opinion in that case, the judgment is affirmed.

Affirmed.

2131A. 608

Gen. No. 608

Carl F. Hotstorf, appellee.

vs. City of Elgin, appellant.

Appeal from City Court Elgin.

Reversed, 1. of 1914.

In this case the appellant Carl F. Hotstorf sued

the city of Elgin to recover damages which he alleged he suffered because the city in making a certain local improvement namely paving Division street, in the city of Elgin, cut down the grade of the street so as to cut off ingress and egress to and from his property which fronted on the street. There was

a trial by jury and a verdict and judgment for appellee for

\$3000; this appeal is prosecuted from that judgment.

The questions involved in this appeal and the errors

assigned and argued are the same as in the case of Louise A. Hotstorf v City of Elgin, Gen. No. 6043, in which an opinion

has been filed at the present term. For the reasons stated

in the opinion in that case, the judgment is affirmed.

Affirmed.

REVEREND

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

thousand nine hundred and
day of
and of the said Appellate Court in
In Testimony Whereof, I hereunto set my hand and affix the
my attested case, of record in my office.
MY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
Second District of the State of Illinois and keeper of the Records and Seal thereof, DO
Christman C. Derry, Clerk of the Appellate Court in

6600

453a
213 I.A. 399

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. ✓DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
April 4, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

6601.

14.

213 I.A. 699

Arthur C. VanKirk,
Defendant in Error,

-vs-

Error to Grundy.

Morris Fibre Board Company,
Plaintiff in Error.

Dibell, P.J.

In the early part of 1914, the Morris Fibre Board Company, a corporation, hereinafter called defendant, was engaged in reconstructing a paper mill at Morris, Illinois, in which it intended to make fibre board for sale. The work was proceeding very slowly, so that its officers estimated that it would be two years more before the plant would be ready to run. They sought a more competent man to superintend the construction. Arthur C. Van Kirk, hereinafter called the plaintiff, had had some twenty-four years' experience in connection with paper mills and was then engaged as paper maker, millman, and superintendent in a paper mill in Ohio. Two officers of defendant, H. D. Eddy and Oscar Gumbinsky, visited plaintiff in Ohio and asked him to come to Morris and superintend the completion of their plant. He had a conversation with them in Ohio and then came to Morris to see the condition of things. He told them that in his opinion their mill was too small to be a success; that if he came, he must have \$400. per month; that they would be likely to wish to get rid of him after the plant was completed, and that he would not come unless they made a contract to retain him for two years. They gave him their reasons for believing that this small mill would be a success. A written

2131.A.689

Error to Grand Jury.

Arthur C. Van Kirk,
Defendant in Error.

-vs-

Morris Fibre Board Company,
Plaintiff in Error.

P.L. 111.

In the early part of 1914, the Morris Fibre Board Company, a corporation, hereinafter called defendant, was engaged in re-constructing a paper mill at Morris, Illinois, in which it intended to make fibre board for sale. The work was proceeding very slowly, so that its officers estimated that it would be two years more before the plant would be ready to run. They sought a more competent man to superintend the construction. Arthur C. Van Kirk, hereinafter called the plaintiff, had had some twenty-four years' experience in connection with paper mills and was then engaged as paper maker, millman, and superintendent in a paper mill in Ohio. Two officers of defendant, H. D. Eddy and Oscar Gumbinsky, visited plaintiff in Ohio and asked him to come to Morris and superintend the completion of their plant. He had a conversation with them in Ohio and then came to Morris to see the condition of things. He told them that in his opinion their mill was too small to be a success; that if he came, he must have \$400. per month; that they would be likely to wish to get rid of him after the plant was completed, and that he would not come unless they made a contract to retain him for two years. They gave him their reasons for believing that this small mill would be a success. A written

contract (as the Statute of Frauds requires) was entered into between the defendant as the first party, and plaintiff as second party, dated Feb.26,1914, by which plaintiff was employed by defendant for two years, beginning March 9,1914, and ending March 9,1916, to superintend the construction of the mill and thereafter to superintend the mill for the manufacture of fibre board and to give all his time and ability to the construction and subsequent operation of the mill, and defendant agreed to furnish all labor and material and machinery and to pay plaintiff \$4800. per year in equal monthly payments installments of \$400. Plaintiff removed his family to Morris and entered upon the work and had the mill constructed in about four months, and thereafter superintended the manufacture of fibre board. After about a year defendant discharged plaintiff. At that time the paper business in the United States and Canada was much demoralized because of the European war then prevailing, and many paper mills were idle. Plaintiff sought for other employment in his line of business, and failed to obtain employment for about three months, and then got it at a much lower salary, and so continued till the expiration of the two years provided by the contract. He then began this suit to recover his loss by reason of the discharge, which he alleged was an unjust one. He filed an original declaration of one count and two additional counts, each of which was based entirely upon said written contract and its violation by defendant. Defendant pleaded the general issue and filed therewith a notice that it would prove as a defense negligence of plaintiff in the performance of his duties under the contract set up in the declaration; that defendant suffered material damage by plaintiff's absence from the plant

contract (as the Statute of French requires) was entered into between the defendant as the first party, and plaintiff as second party, dated Feb. 26, 1914, by which plaintiff as co-defendant for two years, beginning March 2, 1914, and ending March 2, 1916, to superintend the construction of the mill and thereafter to superintend the mill for the manufacture of fibre board and to give all his time and ability to the construction and subsequent operation of the mill, and defendant agreed to furnish all labor and material and machinery and to pay plaintiff \$4800. per year in equal monthly payments installments of \$400. Plaintiff removed his family to Morris and entered upon the work and had the mill constructed in about four months and thereafter superintended the manufacture of fibre board. After about a year defendant discharged plaintiff. At that time the paper business in the United States and Canada was much demoralized because of the European war then prevailing, and many paper mills were idle. Plaintiff sought for other employment in his line of business, and failed to obtain employment for about three months, and then got it at a much lower salary, and so continued till the expiration of the two years provided by the contract. He then began this suit to recover his loss by reason of the discharge, which is alleged was an unjust one. He filed an original declaration of one count and two additional counts, each of which was based entirely upon said written contract and its violation by defendant. Defendant pleaded the several issues and filed therewith a notice that it would prove as a defense negligence of plaintiff in the performance of his duties under the contract set up in the declaration, but defendant suffered material damage by plaintiff's absence from the

during business hours; that plaintiff failed to devote all his time and attention and ability to the manufacture of fibre board; as required by the contract; that he devoted much time to his own private affairs; that about September 1, 1914, the contract described in the declaration was wholly rescinded by the mutual agreement of the parties, and that a new contract was then made by the parties in full satisfaction of the contract described in the declaration. There was a jury trial and a verdict for plaintiff for \$3450; a motion by defendant for a new trial was denied, and plaintiff had judgment on the verdict. This is a writ of error sued out by defendant to review said judgment. Defendants contends (1) that plaintiff was justly discharged and therefore cannot recover; (2) that the contract was abandoned and a new contract made by mutual consent, and therefore plaintiff cannot recover under this declaration, which is based solely upon the written contract of February, 1914; (3) that if the written contract was not wholly abandoned, it was at least modified so that defendant was only bound to pay plaintiff \$266.67 per month, and therefore the court erred in giving an instruction for plaintiff which authorized a verdict for him on the basis of \$400. per month, and erred in refusing an instruction requested by defendant which would have limited the recovery to \$266.67 per month, and the verdict and the judgment are therefore excessive; (4) that the double payment by defendant to plaintiff of one or two small expense bills entitled defendant to a credit which would have reduced the verdict; and (5) that the court erred in admitting certain evidence for plaintiff and especially of conversations by Harman Gumbinsky out of the presence of officers of defendant.

plaintiff failed to devote all his time and attention and ability to the management of these boards; as required by the contract; that he devoted much time to his own private affairs; that about September 1, 1914, the contract described in the declaration was wholly rescinded by the mutual consent of the parties, and that a new contract was then made by the parties in full satisfaction of the contract described in the declaration. There was a jury trial and a verdict for plaintiff for \$3450; a motion by defendant for a new trial was denied, and plaintiff had judgment on the verdict. This is a writ of error sued out by defendant to review said judgment. Defendants contends (1) that plaintiff was justly discharged and therefore cannot recover; (2) that the contract was abandoned and a new contract made by mutual consent, and therefore plaintiff cannot recover under this declaration, which is based solely upon the written contract of February, 1914; (3) that in the written contract was not wholly abandoned, it was at least modified so that defendant was only bound to pay plaintiff \$260.67 per month, and therefore the court erred in giving an instruction for plaintiff which authorized a verdict for him on the basis of \$400. per month, and erred in refusing an instruction requested by defendant which would have limited the recovery to \$260.67 per month, and the verdict and the judgment are therefore excessive; (4) that the amount paid by defendant to plaintiff of one or two small expenses bills entitled defendant to a credit which would have reduced the verdict; and (5) that the court erred in admitting certain evidence for plaintiff in especially of conversations by defendant with Gambinsky out of the presence of officers of defendant.

There are about 450 pages of evidence in this record and much of it is devoted to the question whether defendant was justified in discharging plaintiff. The court at the request of defendant gave the jury several instructions telling the jury what conduct by plaintiff would warrant the employer in discharging him and that if they found plaintiff guilty of such misconduct or lack of performance of his duty, they should find for defendant. The jury found for plaintiff and therefore found that cause for discharge did not exist. It would serve no useful purpose to set out or discuss the details of the mass of evidence on that subject. We are of opinion that the evidence warranted the jury in deciding that question as they did.

Eddy and Gumbinski were not only stockholders and officers in defendant company but they were also stockholders in the Eddy Paper Company, a corporation ^{which} owned two paper mills situated respectively at Three Rivers and White Pigeon, Michigan. Eddy was president and manager of the latter company, but spent much of his time at Morris in connection with the business of defendant. Eddy died in August 1914, and plaintiff and Gumbinski attended the funeral at Three Rivers. They had some conversation in Three Rivers and further conversation in Morris as to what should be done with the management of the business in Michigan. It was arranged that plaintiff should take certain supervision of the Michigan business, and should spend four days each week in Morris and two days each week at the two plants in Michigan, and should do the traveling between Morris and Michigan by night, and that the Eddy Paper Company should pay these traveling expenses and one-third of his salary. Plaintiff testifies that at each of

There are about 130 pages of evidence in this record and much of it is devoted to the question whether defendant was justified in discharging plaintiff. The court at the request of defendant gave the jury several instructions telling the jury what conduct by plaintiff would warrant the employer in discharging him and that if they found plaintiff guilty of such misconduct or lack of performance of his duty, they should find for defendant. The jury found for plaintiff and therefore found that cause for discharge did not exist. It would serve no useful purpose to set out or discuss the details of the mass of evidence on that subject. We are of opinion that the evidence warranted the jury in reaching that question as they did.

W. H. Hobb and Gumbinski were not only stockholders and officers in defendant company but they were also stockholders in the Hobb Paper Company, a corporation ^{which} owned two paper mills situated respectively at Three Rivers and White Pigeon, Michigan. Hobb was president and manager of the latter company, but spent much of his time at Morris in connection with the business of defendant. Hobb died in August 1914, and plaintiff and Gumbinski attended the funeral at Three Rivers. They had some conversation in Three Rivers and further conversation in Morris as to what should be done with the management of the business in Michigan. It was arranged that plaintiff should take certain supervision of the Michigan business, and should spend four days each week in Morris and two days each week at the two plants in Michigan, and should make the traveling between Morris and Michigan by night, and that the Hobb Paper Company should pay these traveling expenses and one-third of his salary. Plaintiff testifies that each of

these conversations he was unwilling to do this and brought up the question of his contract with defendant, and that Gumbinski who was an officer of defendant, assured him each time that this arrangement should not affect his contract with defendant. Of course, it was immaterial that the Eddy Paper Company paid a part of his salary. That was a matter between the two paper companies. He rendered to defendant full accounts for expenses in traveling to Michigan and back, and the bookkeeper of defendant sent them to the Eddy Paper Company. In his testimony as to these conversations Gumbinski did not mention the reference to the contract between the plaintiff and the defendant, but, so far as the abstract shows, he did not directly deny that such references were made and such assurances given by him. It is extremely probable that plaintiff would inquire of Gumbinski what effect these arrangements would have upon the written contract, and that he would not have agreed to go to Michigan for a time which was left wholly indefinite unless he was assured that his written contract for two years' service was not affected thereby. At the request of defendant the jury were instructed that plaintiff could only recover on the contract described in the declaration, and that if the jury found from the evidence that the terms of plaintiff's employment were changed by a new agreement by defendant, and the Eddy Paper Company, the terms of which were inconsistent with the written contract, they should find for defendant. By finding for plaintiff under that instruction the jury found that the terms of the written contract were not changed by the arrangement that plaintiff should perform certain duties in Michigan two days in the week and that the Eddy Paper Company should contribute to his salary.

and that the Bddy Paper Company should contribute to his salary.
that instructed the jury found that the terms of the written
contract were not changed by the arrangement that plaintiff
should find for defendant. My finding for plaintiff under
of which were inconsistent with the written contract, they
agreement by defendant, and the Bddy Paper Company, the terms
that the terms of plaintiff's employment were changed by a new
the decision, and that if the jury found from the evidence
that plaintiff could only recover on the contract described in
thereby. At the request of defendant the jury were instructed
that his written contract for two years' service was not affected
a time which was left wholly indefinite unless he was assured
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far as the abstract shows, he did not directly deny that such
to the contract between the plaintiff and the defendant, but so
as to these conversations Gumbinski did not mention the reference
defendant sent him to the Bddy Paper Company. In his testimony
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companies. He rendered to defendant full accounts for expenses
part of his salary. That was a matter between the two paper
course, it was immaterial that the Bddy Paper Company was a
arrangement should not affect his contract with defendant. Of
who was an officer of defendant, assured him each time that this
the question of his contract with defendant, and that Gumbinski
these conversations he was made.

In our opinion the evidence warranted the jury in reaching this conclusion. The court refused an instruction requested by defendant which would have limited the recovery by plaintiff from defendant to \$266.67 per month, but inasmuch as the court instructed the jury at defendant's request that the jury should find for the defendant if the terms of the contract had been changed by the new arrangement, this covered all that ground and was more favorable to defendant than the instruction which would have limited the recovery to \$266.67 per month, and the defendant was not harmed by the refusal of the latter. The claim of the plaintiff in the declaration was upon the original contract without any modification, and the notice only claimed as to this subject that the later arrangement was a new contract which fully satisfied the contract described in the declaration. The court having instructed the jury at the instance of defendant that plaintiff could recover only on the written contract and that if its terms were changed by a new arrangement inconsistent with that contract, they should find for defendant, the court did not err in instructing for plaintiff that if they found the issues in favor of plaintiff, they should allow him as damages the difference between the contract price of \$400 per month and what he actually earned, or could have earned, by reasonable diligence from the time of his discharge to the expiration of the contract. Herman Gumbinski, about eighteen years old and wholly inexperienced in the paper business, a brother of Oscar Gumbinski, was employed in the plant, and said and did many things calculated to embarrass plaintiff in his operation of the paper mill, and also to aggravate plaintiff. These things which he did were proved, and also what he said at certain times.

In our opinion the evidence warranted the jury in reaching this conclusion. The court treated an instruction requested by defendant which would have limited the recovery by plaintiff from defendant to \$200.00 per month, but inasmuch as the court instructed the jury at defendant's request that the jury should find for the defendant if the terms of the contract had been changed by the new arrangement, this covered all that ground and was more favorable to defendant than the instruction which would have limited the recovery to \$200.00 per month, and the defendant was not harmed by the refusal of the latter. The claim of the plaintiff in the declaration was upon the original contract without any modification, and the notice only claimed as to this subject that the later arrangement was a new contract which fully satisfied the contract described in the declaration. The court having instructed the jury at the instance of defendant that plaintiff could recover only on the written contract and that if its terms were changed by a new arrangement inconsistent with that contract, they should find for defendant, the court did not err in instructing for plaintiff that if they found the issues in favor of plaintiff, they should allow him as damages the difference between the contract price of \$400 per month and what he actually earned or could have earned, by reasonable diligence from the time of his discharge to the expiration of the contract. Herman Gumbinski, about eighteen years old and wholly inexperienced in the paper business, a brother of Oscar Gumbinski, was employed in the plant, and said and did many things calculated to embarrass plaintiff in his operation of the paper mill, and also to aggravate plaintiff. These things which he did were proved, and also what he said at certain times.

This evidence was probably all competent on the question of the propriety of the discharge of plaintiff, which included the question of whether he had properly conducted the plant, and whether his failure, if any, to succeed had been caused by the obstructions and misconduct of a brother or one of the officers, and whether the evidence all considered did or did not justify the conclusion that this conduct was inspired by Oscar Gumbinski in an effort to get rid of plaintiff before the expiration of his contract but after his most valuable services in constructing the plant had been finished. But the court below did not admit this testimony until plaintiff's counsel stated that he would prove that this language and conduct were communicated to the officers of the company, and such proof was introduced for plaintiff. If the proof of such communication was not as full as it ought to have been, defendant should have then moved to exclude the proof of such conversations because the proof of such communication to the officers was not given with sufficient detail, in which case plaintiff would have had an opportunity to give fuller details of the communication of such conversations to the officers.

Long after the discharge of plaintiff it was discovered that one or two small expense bills incurred by plaintiff in his trips between Morris and Michigan and delivered by him to the bookkeeper of defendant had been paid by defendant, and also by the Eddy Paper Company. Thereupon defendant wrote to plaintiff about it and apparently he did not reply. This suit had already been started in which he was claiming a large sum

Long after the discharge of plaintiff it was discovered that one or two small expense bills incurred by plaintiff in his trips between Morris and Michigan and delivered by him to the bookkeeper of defendant had been paid by defendant, and also by the Edgely Paper Company. Thereupon defendant wrote to plaintiff about it and apparently he did not reply. This suit had already been started in which he was claiming a large sum of such conversations to the officers.

Had an opportunity to give fuller details of the communication given with sufficient detail, in which case plaintiff would have because the proof of such communication to the officers was not have been moved to exclude the proof of such conversations. Plaintiff was not as full as it ought to have been, defendant should have introduced for plaintiff. If the proof of such communication to the officers of the company, and each proof stated that he would prove that this language and conduct were before did not admit this testimony until plaintiff's counsel in conducting the trial had been finished. But the court expiration of his contract but after his most valuable services plaintiff in an effort to get rid of plaintiff before the justify the conclusion that this conduct was inspired by Oscar officers, and whether the evidence all considered did or did not the obstructions and misconduct of a brother of one of the whether his failure, if any, to succeed had been caused by property of the discharge of plaintiff, which included the This evidence was probably all competent on the question of the

from defendant, and it is not strange that he left the matter to be adjusted during the trial. The proof of the double payment was made near the end of the trial, and seems to have been relied upon by defendant only as showing that plaintiff was justly discharged; and it is clear that it was only an oversight for which plaintiff was less to blame than defendant. Neither side asked any instruction to make a deduction on that account, and it was probably overlooked by the court. Plaintiff was entitled to recover interest on each monthly payment from the end of such month to the date of the trial, and he did not recover such interest, which would have amounted to several hundred dollars. The two items ~~therefor~~ here complained of are less than \$50. They are therefore much more than covered by the failure to allow plaintiff interest.

We are of opinion that the verdict does substantial justice between the parties under the evidence. The judgment is therefore affirmed.

from defendant, and it is not strange that he left the matter to be adjusted during the trial. The fact of the bonds payment was made near the end of the trial, and seems to have been relied upon by defendant only as showing that plaintiff was justly discharged; and it is clear that it was only an oversight for which plaintiff was less to blame than defendant. Neither side asked any instruction to make a deduction on that account, and it was probably overlooked by the court. Plaintiff was entitled to recover interest on each monthly payment from the end of such month to the date of the trial, and he did not recover such interest, which would have amounted to several hundred dollars. The two items herein have complained of are less than \$20. They are therefore much more than covered by the failure to allow plaintiff interest.

We are of opinion that the verdict was substantial justice between the parties under the evidence. The judgment is therefore affirmed. The court is of opinion that the evidence was not sufficient to sustain the verdict. The court is of opinion that the evidence was not sufficient to sustain the verdict. The court is of opinion that the evidence was not sufficient to sustain the verdict.

Long

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by the 25th day
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STATE OF ILLINOIS, }
SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

I, James M. Smith, Clerk of the Appellate Court in
the State of Illinois, and keeper of the Records and Seal thereof, do
 hereby certify that the within and foregoing is a true and correct
 copy of the original of the within and foregoing as the same
 appears of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the
 seal of the said Appellate Court, at Chicago, this
day of June, in the year of our Lord one
 thousand nine hundred and

454a
213 I.A. 699

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYRES, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
April 4, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

27 JUL 64

RE: [illegible]

[illegible text]

[illegible]

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| [illegible] | [illegible] |
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| [illegible] | [illegible] |
| [illegible] | [illegible] |

REMEMBERED, that afterwards, to-wit: on
[illegible] 1964, the opinion of the Court was filed in
[illegible] of said Court, in the words and figures

Gen. No. 631.

Agenda No. 57.

October Term, 1918.

Nathan Grisson,

213 I.A. 699

-vs- Appellee,

Appeal from Livingston.

The Trustees of the Second
Baptist Church of Pontiac,
Illinois,
Appellants.

Carnes, J.

H. C. Jordan, Moses Ray, and C. W. Dyson, Trustees of the Second Baptist Church of Pontiac, Illinois, appeared May 9, 1918, in the circuit court of Livingston county on a motion filed by them June 18, 1917, in the following words:-

"State of Illinois
Livingston County, ss

CIRCUIT COURT
May Term, A. D. 1918.

"Nathan Grisson,
-vs-
H. C. Jordan, Moses Ray,
and C. W. Dyson, Trustees
of the Second Baptist
Church of Pontiac. } Appeal.

" And now comes H.C. Jordan, Moses Ray, and C. W. Tyson, Trustees of the Second Baptist Church of Pontiac, by Arthur A. Lowry, their attorney, and move the court to enter an order directing the clerk of this court to place said cause on the trial docket of this court, and to file the appeal bond herein nunc pro tunc, as of date June 6th, A. D. 1918." They presented therewith the affidavit of said Dyson in substance that May 22, 1916, Nathan Grisson, named as plaintiff in the title to the cause, "recovered a judgment against the said trustees" of \$83.12, before a justice of the peace of said

October Term, 1918.

Case No. 1918.

Gen. No. 1918.

2131.A. 699

Appeal from Livingston.

Appellants,

-vs-

The Trustees of the Second Baptist Church of Pontiac, Illinois.

Appellees.

The Hon. JOHN M. WYSON.

Plaintiff in Error.

H. C. Jordan, Moses Ray, and G. W. Wyson, Defendants.

the Second Baptist Church of Pontiac, Illinois, appeared May 9, 1918, in the circuit court of Livingston county on a motion filed by them June 18, 1917, in the following words:-

CIRCUIT COURT
Term, A. D. 1918.

"State of Illinois
Livingston County."

"Nation Union."

-vs-

H. C. Jordan, Moses Ray, and G. W. Wyson, Trustees of the Second Baptist Church of Pontiac.

And now comes H. C. Jordan, Moses Ray, and G. W. Wyson, Trustees of the Second Baptist Church of Pontiac, by Arthur A. Lowry, their attorney, and move the court to enter an order directing the clerk of this court to place said cause on the trial docket of this court, and to file the appeal bond herein nunc pro tunc, as of date June 6th, A. D. 1918."

They presented therewith the affidavit of said Wyson in substance that May 22, 1916, Nathan Grisson, named as plaintiff in the title to the cause, "recovered a judgment against the said trustees" of \$28.12, before a justice of the peace of said

"county; and within twenty days thereafter the defendants appeared at the circuit clerk's office and paid their \$5.00 advance clerk's fee on appeal, and attempted to execute a valid appeal bond, and then and there delivered said bond to the deputy clerk in charge of said office who told them he did not approve bonds but would call the clerk's attention to it on his return from Chicago and he would take care of the matter; that the defendants were not advised that the clerk had failed to do so until after the time for appeal had expired; that the parties signing said appeal bond had sufficient property in their official capacity as trustees and also as individuals to make said appeal bond good, and that they were willing and prepared to make said bond meet any further legal requirements directed by the court; further states that the defendants have a meritorious defense, alleging detailsthereof, and that the advance fee has been in possession of the clerk ever since it was so paid, and the cause has not been placed on the trial docket, or the appeal bond filed.

The appeal bond was presented with the motion and affidavit. It is on its face the bond of the Second Baptist Church of Pontiac, Illinois, and said trustees; in its conditions reciting that Nathan Grisson recovered before the justice of the peace a judgment against "the above bounden Second Baptist Church of Pontiac, Illinois", from which said church has taken an appeal, etc. Providing that if said church shall prosecute its appeal with effect, etc., the obligation to be void; otherwise to remain in full force. It is signed Second Baptist Church of Pontiac, Ill., followed

No. 1001. ... and within twenty days thereafter the defendants ...

... at the circuit clerk's office and paid their \$5.00 ...

... advance clerk's fee on appeal, and attempted to execute a ...

... and then and there delivered said bond to ...

... of said office who told them he did ...

... but would call the clerk's attention to it ...

... on his return from Chicago and he would take care of the matter; ...

... the defendants were not advised that the clerk had failed ...

... to do so until after the time for appeal had expired; that ...

... the parties signing said appeal bond had sufficient property ...

... in their official capacity as trustees and also as individuals ...

... to make said appeal bond good, and that they were willing and ...

... prepared to make said bond meet any further legal requirements ...

... dictated by the court; further states that the defendants ...

... have a meritorious defense, alleging details thereof, and that ...

... the advance fee has been in possession of the clerk ever since ...

... it was not paid, and the cause has not been placed on the trial ...

... docket, or the appeal bond filed.

The appeal bond was presented with the motion and ...

affidavit. It is on its face the bond of the Second Baptist ...

Church of Pontiac, Illinois, and said trustees; in its con- ...

ditions reciting that Nathan Crismon recovered before the ...

justice of the peace a judgment against "the above bounden ...

Second Baptist Church of Pontiac, Illinois, from which said ...

church has taken an appeal, etc. Providing that if said ...

church shall prosecute its appeal with effect, at ... the ...

obligation to be void; otherwise to remain in full force. ...

It is signed Second Baptist Church of Pontiac, Ill., followed

by the names of said three defendants, with the word "seal" set opposite each signature, including that of the church.

Grisson, the plaintiff, entered a limited appearance for the purpose only of an objection to the hearing of the application of the defendants, alleging a want of jurisdiction of the court to hear said matter because "the attempted appeal is not in substantial compliance with the statute providing for appeals from justice courts", because of "the omission of a surety or sureties, as required". The court refused the motion and this appeal followed.

The proceedings are shown by bill of exceptions. The case is presented and argued on the theory that we are to deal with all the facts so shown. No transcript of the justice's judgment was before the circuit court. The motion denied asked for two things: (1) That the clerk be directed to place said cause on the trial docket; (2) that he be directed to file the appeal bond nunc pro tunc as of June 6, 1916. The bond had not been approved, and the motion did not ask that it be approved. It assumed if the bond was sufficient approval could be dispensed with. The affidavit of Dyson said that the defendants were willing and prepared "to make said bond meet any further requirements, if necessary". But the motion on which the court acted did not include a request for leave to file an additional bond. According to the affidavit the judgment was against three men described as "Trustees of the Second Baptist Church of Pontiac, Illinois". This is a mere descriptive personam, leaving the judgment against the three men as individuals the same as if they had been described as farmers,

by the names of said three defendants, with the word "seal" set
opposite each signature, including that of the clerk.

Grisson, the plaintiff, entered a limited appearance
for the purpose only of an objection to the hearing of the ap-
plication of the defendants, alleging a want of jurisdiction of
the court to hear said matter because "the attempted appeal is
not in substantial compliance with the statute providing for ap-
peals from justice courts", because of "the omission of a surety
or sureties, as required". The court refused the motion and
this appeal follows.

The proceedings are shown by bill of exceptions. The
case is presented and argued on the theory that we are to deal
with all the facts as shown. No transcript of the justice's
judgment was before the circuit court. The motion denied asked
for two things: (1) That the clerk be directed to place said

case in the trial book; (2) that he be directed to file the
affidavit of bond made on June 6, 1916. The bond had
not been approved, and the motion did not ask that it be ap-
proved. It assumed if the bond was sufficient approval could
be dispensed with. The affidavit of Tyson said that the de-
fendants were willing and prepared to make said bond meet any
further requirements, if necessary. But the motion on which
the court acted did not include a request for leave to file an
additional bond. According to the affidavit the judgment was
against three men described as "Trustees of the Second Baptist
Church of Pontiac, Illinois". This is a mere descriptive
personnel, leaving the judgment against the three men as in-
dividuals the same as if they had been described as farmers,

carpenters, or blacksmiths. The bond was drawn to secure a judgment against the church; but there was no such judgment. There is nothing in the record to show whether the church was a corporation. On the face of the record the bond was signed by the three defendants, and no surety. The attack on the bond in the court below, and here, is based on that ground, which seems valid. The general rule is "When it is required by statute or valid rule of court that the bond or undertaking shall be approved, its approval by the proper person and in the prescribed manner is one of the prerequisites necessary for perfecting the appeal." (3 Corpus Juris, 1172.) The Justice act of 1872, section 69, provided that no appeal from a justice should be dismissed for any informality in the appeal bond, but it should be the duty of the court before whom the appeal was pending & to allow an amendment within a reasonable time so that a trial might be had on the merits. This provision was omitted in the revision of 1895. (See J.& A/ Stats. Vol.4, note, page 3800.) But this court held in Hepner v. Hepner, 112 Ill.App.598, that the provision still remained in force. Authorities on the subject of defective appeal bonds are quite thoroughly reviewed and discussed in that opinion. Giving appellants the benefit of that statute, still we think the court was not required to order the bond presented, which recited another and different judgment from the one appealed from and had never been approved, to be filed, or of his own motion to require an appeal bond.

Appellants were not without fault in failing to perfect their appeal. What was said ^{to} by them by the deputy clerk

carpenters, or blacksmiths. The bond was given to secure a judgment against the church; but there was no such judgment. There is nothing in the record to show whether the church was a corporation. On the face of the record the bond was signed by the three defendants, and no surety. The attack on the bond in the court below, and here, is based on that ground, which seems valid. The general rule is "When it is required by statute or valid rule of court that the bond or undertaking shall be approved, its approval by the proper person and in the prescribed manner is one of the prerequisites necessary for perfecting the appeal." (3 Corpus Juris 1172.) The statute act of 1872, section 69, provided that no appeal from a justice should be dismissed for any informality in the appeal bond, but it should be the duty of the court before whom the appeal was pending to allow an amendment within a reasonable time so that a trial might be had on the merits. This provision was omitted in the revision of 1895. (See J. & A. State Vol. 4, note, page 2600.) But this court held in *Hopner v. Hopner*, 122 Ill. App. 536, that the provision still remained in force. It is on the subject of defective appeal bonds and quite thoroughly reviewed and discussed in that opinion. Giving appellants the benefit of that statute, still we think the court was not required to order the bond presented, which was another and different judgment from the one appealed from and had never been approved, to be filed, or of his own motion to require an appeal bond.

Appellants were not without fault in failing to perfect their appeal. What was said by the deputy clerk

must be taken the same as if said by the clerk; that is, the same as if the clerk had received the bond and told them he could not approve it then but would pass on the matter later. There was no promise or undertaking that the clerk would approve the bond, and it was not one that he ought to approve. He may have been under a social duty to inform them of the fact; but it was their legal duty to file a bond and get it approved. It may be further observed that if appellants failed to perfect the appeal through no fault of their own, they were not without remedy. The proceeding by certiorari was open to them. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }

and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this_____

day of_____in the year of our Lord one
thousand nine hundred and_____

Clerk of the Appellate Court.

Is _____
I, _____, Clerk of the Appellate Court in
and keeper of the Records and Seal thereof, do
that the foregoing is a true copy of the opinion of the said Appellate Court in
cause, of record in my office.
Who know, I hereunto set my hand and affix the
seal of the said Appellate Court at _____, this _____
day of _____, in the year of our Lord one
thousand nine hundred and _____.

Clk of the Appellate Court

6636

455a

213 I.A. 699

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

- Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYRES, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
April 4, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6636.

Agenda No.45.

October Term, 1918.

213 I.A. 699

Ersmo Paglia,
Appellant,

-vs-

Error to Winnebago.

Chicago, Milwaukee & Gary
Railway Company,
Appellee.

Garnes, J.

Ersmo Paglia, the appellant, on the morning of April 20, 1916, at Rockford, Illinois, got on to the footboard of a switch engine of the appellee, Chicago, Milwaukee & Gary Railway Company, that was backing slowly near his house. His only purpose was to get a free ride. After running a short distance the engine came in contact with a metal can about fourteen inches high and of the same diameter lying on or near the track. This collision in some way elevated the part of the footboard on which he was standing and threw him off, severely injuring him. He brought this action to recover for that injury, and at the close of the evidence the court entered judgment on a directed verdict for the defendant, from which this appeal is prosecuted.

The declaration set out the facts as above stated with averments as to the can that there was a large and heavy obstruction in the center of said track, which was seen by the engineer in time so in the exercise of due care he could have stopped the engine before reaching it; also that the plaintiff was on the footboard at the invitation of the engineer. The act of the engineer is there characterized as improper in care-

October Term, 1919.

Agenda No. 45. Ben. No. 6636.

2131A. 699

Error to Winnebago.

Appellant.

-vs-

Chicago, Milwaukee & Gary
Railway Company,

Appellee.

Wm. J. McGee, D.A.

Ermano Paglia, the appellant, on the morning of April 30, 1916, at Rockford, Illinois, got on to the footboard of a switch engine of the appellee, Chicago, Milwaukee & Gary Railway Company. That was backing slowly near his house. His only purpose was to get a free ride. After running a short distance the engine came in contact with a metal car about fourteen inches high and of the same diameter lying on or near the track. This collision in some way elevated the part of the footboard on which he was standing and threw him off, severely injuring him. He brought this action to recover for that injury, and at the loss of the evidence the court entered judgment on a directed verdict for the defendant, from which this appeal is prosecuted.

The declaration set out the facts as above stated with

events as to the fact that there was a large and heavy obstruction in the center of said track, which was seen by the engineer in time so in the exercise of due care he could have stopped the engine before reaching it; also that the plaintiff was on the footboard at the invitation of the engineer. The act of the engineer is there characterized as improper in care-

lessly and negligently running and driving the locomotive against said obstruction. The general issue was plead.

Appellant insists that the declaration charges a wanton and wilful act of the defendant. and does not claim that appellee owed him any duty except not to wilfully and wantonly injure him. There is no allegation in the declaration showing any relation between appellant and appellee raising a duty or obligation toward him as a passenger, and under the evidence it is clear and undisputed that he was either a trespasser or a mere licensee. There is perhaps room for argument whether the declaration averred facts constituting wilful negligence, and if so, whether it can be regarded as a charge of wanton and wilful conduct in the fact of its own characterization of those facts as mere negligence. But it is unnecessary to discuss that question if the evidence entirely fails to show wilful and wanton conduct on the part of the engineer.

In addition to the uncontroverted proven facts above stated, appellant testified that the engine slowed down as it was passing him; that he spoke to the engineer as he got on to the footboard, and that he saw the can lying on or near the track and told the engineer to stop, and the engineer looked in that direction. The engineer testified that he did not know appellant was on the engine, did not see or hear anything of him until he was thrown off the footboard, and that he did not see the can. The court in directing a verdict was bound to assume the truth of appellant's testimony so contradicted by the engineer; therefore, the inquiry^{here} is whether, assuming the truth of that

lessly and negligently running and driving the locomotive against said obstruction. The general issue was tried.

Appellant insists that the declaration charges a wanton and willful act on the defendant, and does not claim that appellant owed him any duty except not to willfully and wantonly injure him. There is no allegation in the declaration showing any relation between appellant and appellee raising a duty or obligation toward him as a passenger, and under the evidence it is clear and undisputed that he was either a trespasser or a mere licensee. There is perhaps room for argument whether the declaration averred facts constituting willful negligence, and if so, whether it can be regarded as a charge of wanton and willful conduct in the fact of its own characterization of these facts as mere negligence. But it is unnecessary to discuss that question if the evidence entirely fails to show willful and wanton conduct on the part of the engineer.

In addition to the undisputed proven facts above stated, appellant testified that the engine slowed down as it was passing him; that he saw the engine slowing down as it approached the footboard, and that he saw the car lying on or near the track and told the engineer to stop, and the engineer looked in that direction. The engineer testified that he did not know appellant was on the engine, did not see or hear anything of him until he was thrown off the footboard, and that he did not see the car. The court in directing a verdict was bound to assume the truth of appellant's testimony so contradicted by the engineer; therefore, the inquiry is whether, assuming the truth of that

evidence with all proper inferences to be drawn therefrom, it fairly and reasonably tended to support a charge of a wanton and wilful act of the engineer. There is a tendency to confuse negligence, especially if gross, with wilful and wanton acts, and perhaps expressions in some reported cases indicating that one may shade into the other. The law, however, is clearly stated in C.B. & N.R.R.Co., v. Johnson, Admr. 103 Ill. 512, quoted with approval in Chicago City Ry. Co., v. Jordan, 215 Ill. 390, on page 397, as follows:- "In negligence there is no purpose to do a wrongful act or to omit the performance of a duty. Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act." The court after so quoting from the former case adds- "Where there is a particular intention to injure, or a degree of wilful or wanton recklessness which authorizes a presumption of an intention to injure generally, the act ceases to be merely negligent and becomes wilful or wanton. In such a case there may be an actual intent to injure, or such a conscious or intentional disregard of the rights of others as to warrant a conclusion that an injury was intended." We see no evidence of a wilful or wanton act. There was certainly no "actual intent to injure." Appellant was an acquaintance of the engineer, and the evidence leaves no reasonable ground for the conclusion that there was a conscious or intentional disregard of the right of appellant. Assuming the truth of appellant's testimony, the engineer might have seen the can. And even assuming that he did see it notwithstanding his evidence that he did not, still there is no ground for presuming "an intention to injure generally". The situation was

evidence with all proper inferences to be drawn therefrom,
 it fairly and reasonably tended to support a charge of a wilful
 and wilful act of the engineer. There is a tendency to
 confuse negligence, especially if gross, with wilful and
 wanton acts, and perhaps expressions in some reported cases
 indicating that one may shade into the other. The law, however,
 is clearly stated in *O.R.R. Co. v. Johnson*, 108 Ill. 512,
 quoted with approval in *Chicago City Ry. Co. v. Jordan*, 215 Ill.
 300, on page 337, as follows: "In negligence there is no purpose
 to do a wrongful act or to omit the performance of a duty.
 Negligence, even when gross, is but an omission of duty. It
 is not designed and intentional mischief, although it may be
 cognate evidence of such an act." The court after so stating
 from the former case adds: "Where there is a particular intention
 to injure, or a degree of wilful or wanton recklessness which
 authorizes a presumption of an intention to injure generally,
 the act ceases to be merely negligent and becomes wilful or
 wanton. In such a case there may be an actual intent to injure,
 or such a conscious or intentional disregard of the rights of
 others as to warrant a conclusion that an injury was intended."
 We see no evidence of a wilful or wanton act. There was cer-
 tainly no "actual intent to injure." Appellant was an accident-
 victim of the engineer, and the evidence leaves no reasonable
 ground for the conclusion that there was a conscious or
 intentional disregard of the right of appellant. Assuming the
 truth of appellant's testimony, the engineer might have seen
 the car. And even assuming that he did see it notwithstanding
 his evidence that he did not, still there is no ground for pre-
 suming "an intention to injure generally." The situation was

not one where an injury would ordinarily occur. The footboard was in two pieces. Appellant could have stepped off the part that was raised by the can on to the other piece, or on to the ground had he foreseen that the can would raise the board. Appellee's counsel say he probably did kick at the can and lose his balance. It is not clear that the act of the engineer was even careless and negligent as characterized in the declaration; but whether it was or not we see no evidence that it was wilful or wanton. It follows that in our opinion the court did not err in directing the verdict. The judgment should therefore be affirmed.

affirmed.

It is not clear that the act of the defendant was even criminal and negligent as characterized in the indictment. It is not clear that the act of the defendant was in violation of any law or rule of the city. It is not clear that the act of the defendant was in violation of any law or rule of the city. It is not clear that the act of the defendant was in violation of any law or rule of the city.

STATE OF ILLINOIS,
SECOND DISTRICT.

}

SS.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

I, Commissioner G. Henry, Clerk of the Appellate Court in
the State of Illinois, and keeper of the Records and Seal thereof, do
CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the case of *Ex parte* *Winters*, I herewith set my hand and affix the
day of _____

thousand nine hundred and

6612

456a

2131.A. 699

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
April 4, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6612.

Agenda 49.

213 I.A. 699

Peter Pelias,
Appellee,

-vs-

Appeal from county court,
Will County.

Mathew Ch Dragajtis,
Appellant.

Niehaus, J.

In this case there was a trial of the right of property in the county court of Will county. The property of the appellee, Peter Pelias, had been levied upon by writ of attachment sued out in the circuit court by the appellant, Mathew Ch Dragajtis. The trial resulted in a verdict for the appellee upon which judgment was rendered, and from this judgment an appeal is prosecuted. The material facts disclosed by the record are that one George Anastasopoulos owned and conducted a grocery and bakery business in the city of Joliet for about four years prior to the commencement of this suit. He had become largely indebted to various parties in connection with his business, and on January 16, 1918, suddenly left the city of Joliet. Among his creditors at that time was the appellee, who claimed that Anastasopoulos owed him about \$1300.00. He also owed a Joliet bank about \$850.00, for which debt the appellee was surety. About January 19, 1918, after the departure of Anastasopoulos attachment proceedings were commenced against Anastasopoulos by the bank, and the appellee, and the grocery and bakery property of Anastasopoulos was levied upon. Afterwards, about January 21, 1918, the appellee paid the claim of the bank, and called a meeting of creditors of Anastasopoulos and made a settlement with them, paying 30 cents on the dollar of their claims. In this way

2131A. 699

Agenda 49.

Gen. No. 6012.

Appeal from county court,
Ill. Court.

Peter Peliss, Appellee,
-vs-
Matthew Ch. Prasgitts, Appellant.

Matthew Ch. Prasgitts, Appellant.

In this case there was a trial of the right of property in the county court of Will county. The property of the appellee, Peter Peliss, had been levied upon by writ of attachment and out in the circuit court by the appellant, Matthew Ch. Prasgitts. The trial resulted in a verdict for the appellee upon which judgment was rendered, and from this judgment an appeal is prosecuted. The material facts disclosed by the record are that one George Anastasopoulos owned and conducted a grocery and bakery business in the city of Joliet for about four years prior to the commencement of this suit. He had become largely indebted to various parties in connection with his business, and on January 16, 1918, and only left the city of Joliet. Among his creditors at that time was the appellee, who claimed that Anastasopoulos owed him about \$1300.00. He also owed a Joliet bank about \$850.00, for which debt the appellee was surety. About January 19, 1918, after the departure of Anastasopoulos attachment proceedings were commenced against Anastasopoulos by the bank, and the goods, and the grocery and bakery property of Anastasopoulos was levied upon. Afterwards, about January 21, 1918, the appellee paid the claim of the bank, and called a meeting of creditors of Anastasopoulos and made a settlement with them, paying 30 cents on the dollar of their claims. In this way

he paid out for Anastasopulos about \$4200.00. On January 24, 1918, Anastasopulos returned to Joliet, and then made a bill of sale disposing of all his grocery and bakery property to the appellee, and the appellee paid \$50.00 in addition to the amounts already paid out for the property and business and took possession of it, and was in possession of it as owner on or about January 30, 1918, when the appellant appeared and negotiated with him for the purchase of the property. The appellee finally proposed to sell to the appellant for \$4500.00, and these terms were accepted by the appellant and he paid \$200.00 on the purchase price. The remainder of the purchase price, however, was never paid, apparently for the reason that the appellant claimed that Anastasopulos owed him \$455.00, and insisted on having that amount allowed on the purchase price, which the appellee refused to do. Afterwards the appellant commenced a suit in attachment on his claim of \$455.00 against Anastasopulos, and had the levy of the writ made upon the property involved in this litigation.

Two grounds are urged and argued for reversal of the judgment. The appellant contends that the verdict and judgment are contrary to the law and the evidence; also that the court erred in refusing to admit certain evidence claimed to be competent and material. The question as to the admissibility of certain evidence arose in this way. The appellant, who claimed to be a creditor of Anastasopulos, had testified that one Mike Pappas, ~~who~~ was present at a certain conversation which he had had with Anastasopulos after Anastasopulos returned to Joliet, and which occurred on the second floor of 225 North Bluff Street about ten or eleven o'clock at night, and in which conversation Anastasopulos had admitted that he was indebted to the appellant.

—

In rebuttal the appellee called Mike Pappas; and Pappas was asked in his examination in chief if he was present at any conversation between the appellee and George Anastasopoulos at 225 North Bluff Street at about ten or eleven o'clock on the night in question, and he answered that he was not there when such a conversation took place between George Anastasopoulos and the appellant. On cross examination the witness said that he was there the next night about eight or nine o'clock; that he went up there to collect some money from Anastasopoulos, and that he, and the appellee, and appellant were there at the same time. Then on cross examination the question was asked by the appellant's counsel-"Was there some talking about George, the money that George owed to Dragajtis at that time", which question was objected to and the objection sustained. It is insisted by the appellant that the court erred in sustaining the objection. But it is apparent that the question related to a different conversation or occasion than the one inquired about in chief, and was therefore properly ruled out on that ground alone. But the question was also objectionable because it assumed that an indebtedness existed between the appellant and Anastasopoulos, which was the controverted question of fact in the case. Nor did appellant's counsel inform the court by an offer to prove that he expected by the answer to the question to show that Anastasopoulos at that time admitted in the presence of the appellee that he was indebted to the appellant.

The main controverted question in the case, and which the instructions of the court submitted to the jury was whether

the instructions of the court submitted to the jury was whether the main controverted question in the case, and which was limited to the appellant. On which he at that time submitted in the presence of the appellee that he expected by the answer to the question to show that Anastasopoulos expected to answer the court by an offer to prove that was the controverted question of fact in the case. Not did inadmissible evidence existed between the appellant and Anastasopoulos, which question was also objectionable because it assumed that an was therefore properly ruled out on that ground alone. But the variation or occasion than the one inquired about in chief, and not it is to say that the question related to a different contingent that the court erred in sustaining the objection. It is insisted by the appellant that the question was asked by the appellant, and the money that there some talking about George, the money that collect some money from Anastasopoulos, and that he, and the appellant, and appellant were there at the same time. Then on night about eight or nine o'clock; that he went up there to cross examination the witness said that he was there the next day place between George Anastasopoulos and the appellant. On and he answered that he was not there when such a conversation at about ten or eleven o'clock on the night in question, between the appellee and George Anastasopoulos at 225 North Bluff in his examination in chief if he was present at any conversation in relation the appellee called Mike Pappas, and Pappas was asked to call for Anastasopoulos about 7

the appellant at the time of the transfer or sale of the business and property of Anastasopoulos to the appellee was a bona fide creditor of Anastasopoulos. It is practically conceded by both parties to this controversy that the sale and transfer of the business and property of Anastasopoulos to the appellee was in conflict with the provisions of the Bulk Sales act; but if the appellant was not a creditor at that time he was not in position to attack the validity of the sale on that ground. There was evidence tending to show that Anastasopoulos was indebted to the appellant in the amount that he claimed. There were a number of facts and circumstances also proven, which tended to impeach his claim. Among other things it was shown that the evidence of indebtedness which appellant produced had been drawn up about the time of the commencement of the suit and then dated back to September 21, 1917. The force of the facts and circumstances which had a bearing on the good faith of the transaction were of such a character that the jury who saw and heard the various witnesses testify about the matters involved were in the best position to determine this question. This court would not be warranted in holding that the jury should have determined differently. If the jury had decided the matters involved in favor of the appellant we would have been equally bound to sustain the finding. But there is another reason why the appellant could not question the validity of the sale to the appellee on the ground that the Bulk Sales Law had not been complied with. A sale made in violation of the Bulk Sales Law is not absolutely void, but only voidable, and voidable only at the instance of a creditor whose rights are invaded thereby. But a creditor may waive his right to question

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 the appellant in the amount that he claimed. There were a number
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 the time of the commencement of the suit and then dated back to
 September 21, 1914. The force of the facts and circumstances
 which had a bearing on the good faith of the transaction were of
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 Sales Law had not been complied with. As a made in violation
 of the Bulk Sales law is not absolutely void, but only voidable,
 and voidable only at the instance of a creditor whose rights are
 invaded thereby. But a creditor may waive his right to question

the sale, and we think that the appellant in this case did so when he negotiated with the appellee and purchased the property in question/ When he purchased the property he did it on the assumption that he regarded the sale from Anastasopoulos to appellee as valid, and acquired appellee's title on that basis.

The record doesnot disclose any reversible error, and the judgment is affirmed.

Judgment affirmed.

the sale, and we think that the appellant is the owner of the property at the time he negotiated with the appellee and purchased the property in question. When he purchased the property he did it on the assumption that he regarded the sale from Amastaspoulos to appellee as valid, and acquired appellee's title on that basis.

The record does not show any reversible error, and the judgment is affirmed.

Among other things it was shown that the appellant had acquired title to the property in question by purchase from the appellee, and that the appellee had acquired title to the property in question by purchase from the appellant.

It is the duty of the court to affirm the judgment of the trial court when the evidence supports it.

The appellant has failed to show any reversible error.

The judgment is affirmed.

The appellant has failed to show any reversible error.

The judgment is affirmed.

The appellant has failed to show any reversible error.

STATE OF ILLINOIS, {
SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

OF THE
DISTRICT
SECOND
CERTIFY
that

213 I.A. 699

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of Our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present -- The Hon. JOHN M. NIEHAUS, Presiding Justice

Hon. DUANE J. CARNES, Justice

Hon. DORRANCE DIBELL, Justice

CHRISTOPHER C. DUFFY, Clerk

CURT S. AYRES, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
April 4, 1919, the opinion of the Court was filed in the
Clerk's office of said court, in the words and figures
following, to-wit:

of the Court and the opinion of the Court was filed in the
and for the Second Circuit of the State of

REMEMBERED, that afterwards, on April 11, 1919, the opinion of the Court was filed in the
the office of said Court, in the words and figures

58

GEN. NO. 6437.

Agenda 28

JOHN KANE and ELLA LURENY,
Appellees;
-vs-

213 I.A. 699

WILLIAM HENRY HUDSON, PORTER
HUDSON, and WILLIAM HENRY
HUDSON as Administrator of
the Estate of JOHN HUDSON,
Deceased.
Appellants.

Appeal from Circuit Court
Iroquois County.

Niehans, J.

This is an appeal prosecuted by William Henry Hudson and others, from a decree of the circuit court of Iroquois County allowing a solicitor's fee of \$1000.00 to be taxed as costs, for the services of the complainant's solicitors in the partition of farm lands of the value of about \$25000.00. It is conceded by the appellants, that the rights and interests of the parties in the premises ~~was~~ partitioned, were correctly set up in the bill, but it is contended that in view of the fact, that the bill also prays, for an accounting from the appellant William Henry Hudson, one of the defendants in the bill, who was a tenant in common with the complainants, that the solicitor's fee should not therefore, have been apportioned among the parties in interest. And it is ^{in the bill} urged that the defendant William Henry Hudson was charged with having received rents and issues arising from said premises for a long period of time, amounting to a large sum of money; and that he denied these charges; that therefore the suit cannot be considered as an amicable proceeding; ^{that} that it was ~~also~~ necessary for this defendant to employ and pay his own counsel on account of the contested matters involved in the accounting; and it would therefore be inequitable to require a contribution from him to pay a part of the fees of the counsel of his opponents. The

answer to this contention of the appellants however is, that the accounting prayed for in the bill, while properly a part of the proceeding, was a thing apart from the matter of the partition. It was not sought to have the amount which the complainants claimed the defendant owed, made a lien on his interest in the premises, nor did it in any other way affect the setting off of such interest to the defendant.

It is conceded that the bill clearly and correctly set up the rights and interests of the parties; and the answer admits, that the rights and interests of the parties are properly set up in the bill. The matter of the accounting prayed for of rents and profits received from the premises by William Henry Jackson under the agreements in the bill, was therefore merely incidental to the partition; nor does the record disclose, even in this feature of the case, any controversy or hostility between the parties. So far as disclosed by the record, the services of complainant's solicitors were fair and just; and brought about proper partition of the land; and no objections were filed by any of the parties in interest in the partition, to the report of the commissioners who were appointed to make the partition. Under the holding of the Supreme Court in *Stollard v. Nyeum* 240 Ill. 472 this presented a proper case for the apportionment of the solicitor's fee ratably among the parties in interest in the partition; and we are of opinion, that it was therefore properly taxed as a part of the costs.

While apparently there was no dispute concerning the interest of the appellant William Henry Jackson, and no attempt is in any way abridge or curtail it, we may have been fairly justified by ordinary business prudence to have his own counsel to keep an eye on the proceedings; ~~this~~ ~~summons~~ ~~does not~~ ~~with~~ the statutory obligation, and right to have the fee of the appellant's solicitors apportioned and taxed as costs under the

circumstances here presented. Searl v. Searl 132 Ill.App. 129.
The court held in Dunshee v. Dunshee 17 Ill.App.290 in such a
similar situation, that though it may be thought prudent
where the personal relations of the parties are unfriendly, for
the defendant to employ counsel, to use that the plaintiff's
was regular, and by advantage taken of Searl, that was
not a fault in refusing to pay the bill, but

Appellate further advised, that the evidence
showed, that the fee allowed was a usual and customary amount
charged by solicitors for the services rendered, and
examination of the record however disclosed, that the evidence
was sufficient on this point to justify the court in finding
that \$1000.00 was the amount that competent attorneys ^{in Duquenois County} would
usually charge or contract for, to render such services as were
rendered in this case. The decree is therefore affirmed.

Decree Affirmed.

...that the fee allowed was a normal and usual fee for the
...further stated, that the evidence
...in relation to the fee
...no advance fee or bonus, but
...to employ counsel, to see that the
...of the parties are satisfied, and
...that though it may be that the
...as 100.00 in cash.

Testimony of

6816
458a
213 I.A. 700

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYRES, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
April 4, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No.6646.

Agenda 35.

Metta F.H.Dillon,

213 I.A. 700

Appellee,

-vs-

Appeal from circuit court,
Whiteside County.

Mary D.Brenneman, Alice
D.Overson, Margaret Grimes,
Frank A.Grimes, administrator
of the Estate of Moses Dillon,
deceased, The Moses Dillon
Company, a corporation.

Appellants,

and

Joseph G.Dillon, Moses G.Dillon,
and I.L.Weaver, guardian of
Moses G. Dillon,

Appellees.

Niehaus J.

The appellee, Metta F.H.Dillon, widow of Moses Dillon, deceased, filed a bill in equity to set aside and cancel the assignments of 238 shares of stock in the Moses Dillon Company, made by Moses Dillon, deceased, in his lifetime, to the appellants, Mary D.Brenneman, Alice D.Overson, and Margaret Grimes, Joseph G. Dillon and Moses G.Dillon; and to cancel the shares of stock which had been re-issued by the Moses Dillon Company to said parties by virtue of said assignments; and to have said shares of stock returned to the administrator of the estate of said deceased, as a part of the assets of said estate. The reason alleged in the bill for setting aside the assignments of stock is that the stock was never delivered to the assignees in the lifetime of the deceased, and that therefore the title never passed to the assignees, and was still in the assignor at the time of his death. Answers were filed to the bill by the parties defendant, and replications to the answers by the complainant. The cause was

2131 A. 700

Settle E. A. Dillon.

Appellee.

-vs-

Appellant from circuit court.
White Pine County.

Mary D. Brennenman, Alice
D. Overman, Margaret Grimes,
Frank A. Grimes, administrator
of the estate of Moses Dillon,
deceased, the parties
Company, a corporation.
Plaintiffs.

Joseph G. Dillon, James G. Dillon,
and I. L. Weaver, trustees of
James G. Dillon,
Appellees.

Verdict.

The appellee, Metta E. A. Dillon, widow of Moses Dillon, deceased, filed a bill in equity to set aside and cancel the assignments of 238 shares of stock in the Moses Dillon Company, made by Moses Dillon, deceased, in his lifetime, to the appellants, Mary D. Brennenman, Alice D. Overman, and Margaret Grimes, Joseph G. Dillon and Moses G. Dillon; and to cancel the shares of stock which had been re-issued by the Moses Dillon Company to said parties by virtue of said assignments; and to have said shares of stock returned to the administrator of the estate of said deceased, as a part of the assets of said estate. The reason alleged in the bill for setting aside the assignments of stock is that the stock was never delivered to the assignees in the lifetime of the deceased, and that therefore the title never passed to the assignees, and was still in the assignor at the time of his death. Answers were filed to the bill by the parties defendant, and applications to the answers by the complainant. The cause was

referred to the master in chancery and the master reported his findings, which were in favor of the appellee, and exceptions were filed thereto by the appellants. Upon the hearing of the cause the exceptions were overruled by the court, and the court decreed that the ownership of the stock was in Moses Dillon at the time of his death, and that the parties to whom the assignments had been made were not entitled to the stock which had been issued to them, and ordered that the assignments of the stock be canceled and that the stock be re-issued and delivered to the administrator of the estate; also enjoined the appellants from selling or disposing of the shares of stock, and restrained the company from paying them any dividends on same.

The vital question raised on appeal from the decree is whether the stock in question was delivered. The evidence shows that the Moses Dillon Company is a corporation organized and doing business at Sterling; that the deceased, Moses Dillon, owned 238 shares of stock in the corporation. These were embraced in several certificates; Certificate No. 6 was for 220 shares; and this certificate he had assigned on October 15, 1906, to Mrs. Frank A. Grimes and sisters, who were the three daughters of the deceased, the appellants, Mary D. Brennenman, Alice D. Overson and Margaret Grimes. Certificate No. 7 was for 12 shares; and under date of April 28, 1913, he had assigned this to Joseph G. Dillon, his son. Certificates Nos. 2 and 3 were for one share each, and these he had assigned to Moses G. Dillon, his grandson, as of the date, October 15, 1906. Joseph G. Dillon resided in Fargo, North Dakota, and it appears from his testimony that in the month of April 1913 he had received by mail from his father a large envelope addressed to him which was marked "Don't open"; at the same time he received

referred to the master in chancery and the master reported his findings, which were in favor of the appellee, and exceptions were filed thereto by the appellants. Upon the hearing of the case the exceptions were overruled by the court, and the court decreed that the ownership of the stock was in the appellants at the time of his death, and that the parties to whom the assignments had been made were not entitled to the stock which had been issued to them, in order that the assignments of the stock be canceled and that the stock be re-issued and delivered to the administrator of the estate; also enjoined the appellants from selling or disposing of the shares of stock, and restrained the company from paying them any dividends on same.

The vital question raised on appeal from the decree is whether the stock in question was delivered. The evidence shows that the Dillon Company is a corporation then organized and doing business at St. Louis; that the deceased, Moses Dillon, owned 238 shares of stock in the corporation. These were embraced in several certificates; Certificate No. 6 was for 230 shares; and this certificate he had assigned on October 15, 1906, to Mrs. Frank A. Trimmer and sisters, who were the three daughters of the deceased. The appellants, Mary D. Trimmer, Alice T. Overton and Margaret Trimmer. Certificate No. 7 was for 18 shares; and under date of April 28, 1912, he had assigned this to Joseph G. Dillon, his son. Certificates Nos. 2 and 3 were for one share each, and it was he had assigned to Moses G. Dillon, his grandson, as of the date, October 15, 1906. Joseph G. Dillon resided in Fargo, North Dakota, and it appears from his testimony that in the month of April 1912 he had received by mail from his father a large envelope addressed to him which was marked "Bont-ouren"; at the same time he received

from his father a letter stating that he was about to mail him the envelope marked "dont open" and that if anything happened to him he was to open the envelope; otherwise he was to keep it until his father asked for it. He further testified that he placed the envelope in the safe where it remained intact until after his father's death. He then opened it and found that it contained the certificates of stock in question, with the assignments thereon; and thereupon delivered the certificates of stock to the parties named as assignees therein, taking possession of the one assigned to himself. These certificates were then surrendered to the Moses Dillon Company, who issued new shares of stock in lieu thereof in accordance with the assignments. It is evident that the assignments of stock in question when made by the deceased were intended as a future gift of the stock to the parties named as assignees. A delivery was necessary to make a gift legally effective. And to complete the delivery the donor must have surrendered all control and dominion over the property donated. Telford v. Patton, 144 Ill. 611; Williams v. Chamberlain, 165 Ill. 210; People v. Csontos, 275 Ill. 402; Erwin v. Felter, 283 Ill. 36; Lounsberry v. Boger, 193 Ill. App. 384. In this case the evidence is clear that the deceased did not relinquish his control over the stock which he had assigned. His directions to his son in the letter sent, as well as the notation on the envelope containing the certificates of stock, were expressly to the effect that nothing should be done with them- not even to open the envelope unless something should happen to him; and it is evident that the deceased intended to, and did, thereby retain control over the stock until his death. According to these directions Joseph G. Dillon held the stock during the life time of the father, for the father, and subject to any further

referred to the master in obsequy and the master reported his findings, which were in favor of the appellee, and exceptions were filed thereto by the appellant. Upon the hearing of the case the exceptions were overruled by the court, and the court decreed that the ownership of the stock was in Moses Dillon at the time of his death, and that the parties to whom the assignments had been made were not entitled to the stock which had been issued to them. It was also decreed that the assignments of the stock be canceled and that the stock be re-issued and delivered to the administrator of the estate; also enjoining the appellants from selling or disposing of the shares of stock, and restraining the company from paying them any dividends on same.

The vital question raised on appeal from the decree is whether the stock in question was delivered. The evidence shows that the M. & D. Dillon Company is a corporation organized and doing business at Stirling; that the deceased, Moses Dillon, owned 238 shares of stock in the corporation. These were embraced in several certificates; Certificate No. 6 was for 500 shares; and this certificate he had assigned on October 15, 1906, to his three daughters and sisters, who were the three daughters of the deceased, the appellants, Mary D. Bannerman, Alice J. Overton and Margaret L. Overton. Certificate No. 7 was for 10 shares; and under date of April 28, 1912, he had assigned this to Joseph G. Dillon, his son. Certificates Nos. 2 and 3 were for one share each, and these he had assigned to Moses G. Dillon, his grandson, on or about the date, October 15, 1906. Joseph G. Dillon resided in Fargo, North Dakota, and it appears from his testimony that in the month of April 1912 he had received by mail from his father a large envelope addressed to him which was marked "Post office"; at the same time he received

from his father a letter stating that he was about to mail him the envelope marked "dont open" and that if anything happened to him he was to open the envelope; otherwise he was to keep it until his father asked for it. He further testified that he placed the envelope in the safe where it remained intact until after his father's death. He then opened it and found that it contained the certificates of stock in question, with the assignments thereon; and thereupon delivered the certificates of stock to the parties named as assignees therein, taking possession of the one assigned to himself. These certificates were then surrendered to the Moses Dillon Company, who issued new shares of stock in lieu thereof in accordance with the assignments. It is evident that the assignments of stock in question when made by the deceased were intended as a future gift of the stock to the parties named as assignees. A delivery was necessary to make a gift legally effective. And to complete the delivery the donar must have surrendered all control and dominion over the property donated. Telford v. Patton, 144 Ill. 611; Williams v. Chamberlain, 165 Ill. 210; People v. Csontos, 275 Ill. 402; Erwin v. Felter, 283 Ill. 36; Lounsberry v. Boger, 193 Ill. App. 384. In this case the evidence is clear that the deceased did not relinquish his control over the stock which he had assigned. His directions to his son in the letter sent, as well as the notation on the envelope containing the certificates of stock, were expressly to the effect that nothing should be done with them- not even to open the envelope unless something should happen to him; and it is evident that the deceased intended to, and did, thereby retain control over the stock until his death. According to these directions Joseph G. Dillon held the stock during the life time of the father, for the father, and subject to any further

from his father a letter stating that he was about to mail him
the envelope marked "don't open" and that if anything happened to
him he was to open the envelope; otherwise he was to keep it until
his father asked for it. He further testified that he placed the
envelope in the safe where it remained intact until after his
father's death. He then opened it and found that it contained the
certificates of stock in question, with the assignments thereon;
and thereupon delivered the certificates of stock to the parties
named as assignees therein, taking possession of the one assign-
ed to himself. These certificates were then surrendered to the
Hones Tilton Company, who issued new shares of stock in lieu
thereof in accordance with the assignments. It is evident that
the assignments of stock in question were made by the deceased
were intended as a future gift of the stock to the parties named
as assignees. A delivery was necessary to make a gift legally
effective, and to complete the delivery the donor must have sur-
rendered all control and dominion over the property donated.
Tilton v. Patton, 144 Ill. 611; Williams v. Chamberlain, 160 Ill. 210;
Leah v. Gault, 275 Ill. 402; Birwin v. Peiffer, 288 Ill. 26; Donaherty
v. Boyer, 193 Ill. App. 384. In this case the evidence is clear
that the deceased did not relinquish his control over the stock which
he had assigned. His directions to his son in the letter went as
well as the notation on the envelope containing the certificates of
stock, were expressly to the effect that nothing should be done with
them - not even to open the envelope unless something should happen
to him and it is evident that the deceased intended to, and did,
thereby retain control over the stock until his death. According
to these directions, the stock was not to be delivered until the
time of his death, for the reason, as stated in the letter,

directions the father might choose to make in reference thereto; he was the agent of the father in this transaction, and in no sense can he be regarded as the agent of the appellants during the lifetime of the father. We are of opinion that under these circumstances the court below properly found that there was no delivery of this stock in the lifetime of Moses Dillon to the appellants, and that therefore the title to the stock did not pass to the appellants, but remained in the deceased notwithstanding the assignments, and was in the deceased at the time of his death; and that the stock was a part of the assets of his estate. It is contended that Joseph G. Dillon who was a party defendant, and who was called as a witness by the complainant, was not competent under section 2, chap. 51, of the act Concerning Evidence and Depositions, to testify, because one of the parties defendant in the suit was the administrator of Moses Dillon's estate. But it is apparent that the testimony of this witness did not come within the restrictions of the act referred to, even assuming that his testimony was in his own interest as well as in the interest of the complainant; it was not adverse to the interests of the administrator, nor of the estate which the administrator represented; nor can he be considered an adverse party to the administrator, and his testimony was undoubtedly competent so far as it concerned the appellants, whose rights only are involved in this appeal, for they were not defending as heirs of the deceased, but as grantees and assignees. *Johnson v. Fulk*, 182 Ill. 328. We are of opinion that the contents of the letter which Dillon testified he had received from his father contemporaneously with the package containing the stock, was properly admitted upon the proof made of its

directions the father might choose to make in reference thereto; he was the agent of the father in this transaction, and in no case can he be regarded as the agent of the appellants during the lifetime of the father. We are of opinion that under these circumstances the court below properly found that there was no delivery of this stock in the lifetime of Moses Dillon to the appellants, and that therefore the title to the stock did not pass to the appellants, it remained in the deceased notwithstanding the assignment, and was in the deceased at the time of his death; and that the stock was a part of the assets of his estate. It is contended that Joseph Dillon was a party defendant, who was called as a witness by the complainant, was not competent under section 2, chapter 101 of the act concerning Evidence and Testimony to testify, because one of the parties defendant in the suit was the administrator of Moses Dillon's estate. But it is a well settled rule that the testimony of this witness did not come within the restrictions of the act referred to, even assuming that his testimony was in his own interest as well as in the interest of the complainant; it was not adverse to the interests of the administrator, nor of the estate which the administrator represented; nor can he be considered an adverse party to the administrator, and his testimony was a doubtfully competent so far as it concerned the appellants, whose rights only are involved in this appeal, for they were not defending a heir of the deceased, but as trustees and assignees. Johnson v. Turk, 182 Ill. 328. We are of opinion that the contents of the letter which Dillon testified he had received from his father contemporaneously with the alleged conveying the stock, was properly admitted upon the proof made of its

loss or destruction, there being no evidence of any fraudulent or improper purpose in such loss or destruction. Proof of the fact, however, that the deceased retained dominion and control over the stock, which he had assigned, during his lifetime, did not rest on the admissibility of the contents of the letter, but was sufficiently established by other evidence in the case.

We find no error in the record and the decree is affirmed.

Decree affirmed.

How it happened, there being no evidence of any destruction or improper purpose in such case as destruction. It would be best, however, that the document retained in the original over the school, which is not destroyed, should be retained, not just as the responsibility of the school, but as evidence in the case.

It is no error in the record, and the error is corrected.

It is affirmed.

was in his own interest.

Best one

Best one

they were not

Johnson

the same

from

the

STATE OF ILLINOIS, { SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

thousand nine hundred and

day of

seal of the said Appellate Court

1st Testimony Witness, I herein

stated cause, of record in my office.

BY CERTIFY that the foregoing is a true copy of the opinion of the
of record District of the State of Illinois, and keeper of the Records
of record, DO

1st Testimony Witness, I herein

6529

(459a)
213 I.A. 200

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 1 1900 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6629.

Agenda 26.

213 I.A. 700

M. Oltusky, Appellee,

-vs-

Appeal from Circuit Court

Chicago and Northwestern
Railway Company, Appellant.

Lake County.

Niehans, J.

In this case Moses Oltusky, the appellee, residing at Waukegan, bought 336 sacks of potatoes, supposed to weigh 36945 lbs., from Charles Murphy & Company of Chicago. The potatoes were shipped by him by railroad from Shelley, Idaho. The car in which the potatoes were shipped was sealed and the shipment arrived at Waukegan from the point of origin in due time over the Chicago & Northwestern Railway, the appellant's line. A bill of lading was issued by the railroad carried receiving the freight in question in Idaho, and was attached to a sight draft for \$1600.96, drawn on the appellee by Murphy & Company. The car containing the shipment in question after its arrival at Waukegan was inspected by appellee and after inspecting its contents he paid the draft and got the bill of lading, and the potatoes were then delivered to him by the appellant. He removed them from the car and had them weighed on the city scales at Waukegan, and thereby ascertained the net weight of the potatoes and sacks to be 35820 lbs. Appellee claims that the amount of the draft paid was for 36945 lbs, and that the weight as ascertained by the city scales showed a shortage of 1125 lbs, which represented 18 bushels and 45 lbs. of potatoes, market value of which was \$2.60 per bushel, and that he was therefore damaged to the amount of \$48.80, by this shortage in weight. After the appellee had taken the potatoes from the car, and weighed them, and had found this alleged shortage in weight, he asked appellant's

Gen. No. 6829.

2131.A.700

M. Olmstead,

Appellee,

-vs-

Appeal from Circuit Court

Lake County.

Chicago and Northwestern
Railway Company,
Appellant.

Nichols, J.

In this case Moses Olmstead, the appellee, residing at Waukegan, bought 336 sacks of potatoes, supposed to weigh 36945 lbs., from Charles Murphy & Company of Chicago. The potatoes were shipped by him by railroad from Shelby, Idaho. The car in which the potatoes were shipped was sealed and the shipment arrived at Waukegan from the point of origin in due time over the Chicago & Northwestern Railway, the appellant's line. A bill of lading was issued by the railroad carrier receiving the freight in question in Idaho, and was attached to a sight draft for \$1600.96, drawn on the appellee by Murphy & Company. The car containing the shipment in question after its arrival at Waukegan was inspected by appellee and after inspecting its contents he paid the draft and got the bill of lading, and the potatoes were then delivered to him by the appellant. He removed them from the car and had them weighed on the city scales at Waukegan, and thereby ascertained the net weight of the potatoes and sacks to be 36820 lbs. Appellee claims that the amount of the draft paid was for 36945 lbs, and that the weight as ascertained by the city scales showed a shortage of 125 lbs, which represented 18 bushels and 45 lbs. of potatoes, in fact value of which was \$2.60 per bushel, and that he was therefore damaged to the amount of \$48.80, by this shortage in weight. After the appellee had taken the potatoes from the car, and weighed them, and had found this alleged shortage in weight, he asked appellant's

agent to weigh the emptied car. The agent informed him that it would cost him \$2.00 to have the car weighed, which appellee said he would pay, and the agent thereupon promised to have the car weighed, but he did not so do, and afterwards stated that he couldn't have it weighed because it had been immediately reloaded and taken away. Appellee informed the agent that the reason he wanted it weighed was because there was a shortage in weight, which he expected Murphy & Company to settle for, and that they would not settle except on the basis of the railroad's weights; that therefore he had to have the car weighed by the railroad company. Murphy & Company refused to make any settlement with the appellee, and he thereupon sued the appellant before a justice of the peace in Lake county, and recovered a judgment for \$48.80 and costs of the suit. An appeal was taken to the circuit court, and a trial de novo resulted in a verdict and judgment for \$48.75, from which judgment this appeal is now prosecuted.

Appellee claims that he has a right of action against the appellant because of the neglect of appellant's agent to weigh the car and furnish him with railroad weights so he could obtain a settlement from Murphy & Company; that he was prevented by the failure of the agent to weigh the car from obtaining compensation from Murphy & Company for the damages which he suffered on account of the shortage, but he also insists that appellant is liable on general principles, as a railroad carrier, because of a shortage occurring in the transportation of freight. It is evident, however, that if Murphy & Company occasioned the shortage of weight in the shipment of the potatoes and were liable therefor, his right of action against them would not depend on his getting proof of the shortage by railroad weights; nor would the fact that Murphy & Company

agent to weigh the emptied car. The agent informed him that it would cost him \$2.00 to have the car weighed, which appellee said he would pay, and the agent thereupon promised to have the car weighed. But he did not so do, and afterwards stated that he couldn't have it weighed because it had been immediately reloaded and taken away. Appellee informed the agent that the reason he wanted it weighed was because there was a shortage in weight, which he expected Murphy & Company to settle for, and that they would not settle except on the basis of the railroad's weights; that therefore he had to have the car weighed by the railroad company. Murphy & Company refused to make any settlement with the appellee, and he thereupon sued the appellee before a justice of the peace in Lake County, and recovered a judgment for \$48.80 and costs of the suit. An appeal was taken to the circuit court, and a trial de novo resulted in a verdict and judgment for \$48.75, from which judgment this appeal is now prosecuted.

Appellee claims that he has a right of action against the agent not because of the neglect of appellee's agent to weigh the car, but because he furnished him with railroad weights so he could obtain a settlement from Murphy & Company; that he was prevented by the failure of the agent to weigh the car from obtaining compensation from Murphy & Company for the damages which he suffered on account of the shortage, but he also insists that appellee is liable on general principles as a railroad carrier, because of a shortage occurring in the transportation of freight. It is evident, however, that if Murphy & Company occasioned the shortage of weight in the shipment of the potatoes and were liable therefor, his right of action against them would not depend on his getting proof of the shortage by railroad weights; nor would the fact that Murphy & Company

would not settle their liability except by weights furnished by the railroad company impair his right of action, if he had any, against them. Nor is it apparent what particular light the weighing by the railroad company of the emptied car would shed on the matter of the weight of the 336 sacks of potatoes after he had taken them from the car and had them weighed on the city scales, and had thereby already ascertained the actual and exact weight of the potatoes and sacks. It is apparent from the mere statement of this situation that appellee was not deprived of any right of recovery which he may have had against Murphy & Company by the failure of appellant's agent to weigh the car; nor did this failure to weigh the car transpose the legal right to recover for this alleged shortage from Murphy & Company into a right of action against the appellant. Upon the question of the appellee's right to recover from the appellant as a railroad carrier, it may be said that the proof is practically conclusive in showing that the shortage complained of did not occur while the shipment in question was in transit. According to appellee's own testimony he inspected the car and contents and found the seal of the car unbroken and the contents undisturbed, and that there was no evidence of any loss of potatoes from the sacks; but assuming that there is a liability against the railroad carrier on account of this alleged shortage in freight, such liability is not against the appellant. This was an interstate shipment, originating in the state of Idaho. Under the Carmack Amendment to the act to Regulate Interstate Commerce, (Vol. 4, Fed. Stat. Annotated 2nd Edit. sec. 20, par. K, p. 506) appellee's right of action, if he has any, would be against the initial carrier who received the freight and issued the bill of lading therefor. Looney v.

would not settle their liability except by weights furnished by the railroad company impair his right of action, if he had any, against them. Nor is it apparent what particular right the weighing by the railroad company of the emptied car would shed on the matter of the weight of the 336 sacks of potatoes after he had taken them from the car and had them weighed on the city scales, and had thereby already ascertained the actual and exact weight of the potatoes and sacks. It is apparent from the mere statement of this situation that appellee was not deprived of any right of recovery which he may have had against Murphy & Company by the failure of appellant's agent to weigh the car; nor did this failure to weigh the car transmute the legal right to recover for this alleged shortage from Murphy & Company into a right of action against the appellant. Upon the question of the appellee's right to recover from the appellant as a railroad carrier, it may be said that the proof is practically conclusive in showing that the shortage complained of did not occur while the shipment in question was in transit. According to appellee's own testimony he inspected the car and contents and found the seal of the car unbroken and the contents undisturbed, and that there was no evidence of any loss of potatoes from the sacks; but assuming that there is a liability against the railroad carrier on account of this alleged shortage in freight, such liability is not against the appellant. This was an interstate shipment, originating in the state of Idaho. Under the Carmack Amendment to the act to Regulate Interstate Commerce, (Vol. 4, Fed. Stat. Annotated 2nd Ed. sec. 20, par. 1, p. 506) appellee's right of action, if he has any, would be against the initial carrier who received the freight and issued the bill of lading therefor. Dooney v.

Oregon Short Line R.R.Co., 271 Ill.538. The appellee did not introduce in evidence the bill of lading, which would have shown who the initial carrier was; but it is clear from the evidence that it was not the appellant, the shipment having been handled by at least two railroad lines before it reached the line of appellant. For the reasons stated, we are of opinion that appellee has no right of action against the appellant, and judgment is therefore reversed.

Judgment reversed.

Finding of Facts: We find that the evidence in this case does not show any indebtedness from the appellant to the appellee.

Oregon Short Line R.R. Co., v. United States

interference in evidence and the bill of lading, which would have shown

who the initial carrier was; but it is clear from the evidence

that it was not the appellant, the shipment having been handled

by at least two railroad lines before it reached the life of

appellant. For the reasons stated, we are of opinion that appellee

has no right of action against the appellant, and judgment is

therefore reversed.

It is suggested that the appellant is entitled to a

judgment of recovery which is not warranted by the evidence.

But the failure of appellant's agent to deliver the car

to the consignee to which the car was assigned is not a legal right

of action. We find that the evidence in this case

does not show any indebtedness from the

appellant to the appellee.

Further, it may be said that the appellant is entitled to a

judgment of recovery for the value of the car and its contents

lost in transit. But the evidence does not show that the

testimony he has given is true.

That the car was stolen and its contents lost is not

shown as no evidence of any kind is offered.

It is said that there is a presumption that the

account of this appellant is true.

But against the appellant there is no presumption.

That in the state of Idaho.

to the fact that the appellant is interested in the

innocent and the appellant is not interested in the

world we live in.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

THE DISTRICT

Second District of the State of Ill.

6621

460a

213 I.A. 700

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

Let
And
file

BE IT REMEMBERED, that afterwards, to-wit: on

APR 10 1919

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

URT.
... on Tuesday, the
... hundred and nine
... of the State of

the opinion of the Court was filed in
... office of said Court in the words and figures
... to wit:

Gen. No. 6621.

agenda 56.

Avery F. Lambert, Administrator
of the Estate of Harrison
Burdick, Deceased,

213 I.A. 700

-vs-

Appellant,

Appeal from Circuit Court
Will County.

Lee B. Overman,

Appellee.

Niehans, J.

This case involves the matter of an accounting with reference to certain business transactions had between Harrison Burdick, now deceased, and the appellee, Lee B. Overman. In the year 1913, before the occurrence of the transactions in question, Burdick was a farmer residing on a farm which he owned near Plainfield, and had grown old and feeble. The appellee acted as his agent in the sale of his farm, and attended to the collection of the proceeds of the sale; also collected the proceeds of the sale of some of the personal property situated on the farm; and it is evident from the proof that the relation of the appellee to Burdick was one of trust and confidence. On July 31, 1915, Burdick was adjudged to be feeble minded and the appellant, A. F. Lambert, was appointed his conservator. After the appointment of appellant as conservator, he filed a bill in equity in the circuit court of Will county for an accounting. The evidence shows that at the time of the transaction here involved the appellee was in the real estate and insurance business in the city of Plainfield; that he acted for Burdick in the sale of the farm to Orville U. Johnson, and collected the proceeds of the sale of the personal property, and that after the sale of the farm he acted for Burdick in the purchase from William Wylie of a house and lot in Plainfield, to which Burdick removed after

Gen. No. 5031.

Gen. No. 5031.

2131.A.700

Very R. Lambert, Administrator
of the Estate of Harrison
Bridick, Deceased,

Appellant,

Appeal from Circuit Court
Will County.

Lee B. Overman,

Appellee.

WILL COUNTY, ILL.

This case involves the matter of an accounting with re-
 lation to certain business transactions had between Harrison
 Bridick, now deceased, and the appellee, Lee B. Overman. In the
 year 1913, before the occurrence of the transactions in question,
 Bridick was a farmer residing on a farm which he owned near
 Plainfield, and had grown old and feeble. The appellee acted as
 his agent in the sale of his farm, and attended to the collection
 of the proceeds of the sale; also collected the proceeds of the
 sale of some of the personal property situated on the farm;
 and it is evident from the proof that the relation of the appellee
 to Bridick was one of trust and confidence. On July 31, 1915,
 Bridick was adjudged to be feeble minded and the appellant, A. F.
 Lambert, was appointed his conservator. After the appointment
 of appellant as conservator, he filed a bill in equity in the
 circuit court of Will County for an accounting. The evidence
 shows that at the time of the transaction here involved the
 appellee was in the real estate and insurance business in the
 city of Plainfield; that he acted for Bridick in the sale of the
 farm to Orville U. Johnson, and collected the proceeds of the
 sale of the personal property, and that after the sale of the
 farm he acted for Bridick in the collection of the proceeds of the
 sale of the farm and the personal property, and that he

the farm was sold. During the pendency of this suit in the circuit court Burdick died, and thereupon the bill was amended, and the appellant, as administrator, was substituted as complainant. The case was regularly referred to the master to hear the evidence, and to report his conclusions concerning the state of the account between the parties. The proofs were taken before the master at various times between July 26, 1916, and May 4, 1917, and the master thereupon made a report in which he found that there was a balance due from the appellee arising from the proceeds of the sale of the Burdick farm and personal property amounting to the sum of \$2564.05; and that the appellee should also be charged with \$350.00 which he had improperly retained as a part of the purchase price of the Wylie house. To these findings of the master appellee filed objections which were overruled by the master, and the objections were then allowed to stand as exceptions. Upon the hearing of the case by the court the exceptions to the findings of the master concerning the balance due of \$2564.05 were sustained; but the exceptions to the \$350.00 item found by the master to be due from the appellee were overruled, and a decree was entered accordingly; from which decree the appellant, as administrator, prosecutes this appeal. No cross errors were assigned by the appellee with reference to the \$350.00 item, and this must therefore be regarded so far as this appeal is concerned, as a properly adjudicated matter. *Coe v. Moon*, 260 Ill. 76; *Krisman v. Johnson City*, 190 Ill.App.612; *Hyde V. Sokal*, 178 Ill. App.601; *Ross v. New South Farm & H. Co.*, 191 Ill.App. 353.

App. 601; Ross v. New South Town & H. Co., 191 Ill. App. 353.

Kissman v. Johnson City, 190 Ill. App. 618; Hyde v. South, 178 Ill. properly adjudicated matter. See v. Moore, 260 Ill. 76;

therefore be regarded so far as this appeal is concerned, as a

appeal with reference to the \$250.00 item, and this must

present this appeal. No cross errors were assigned by the

ordinarily; from which decree the appellant, as administrator,

from the appellee were overruled, and a decree was entered ac-

exceptions to the \$250.00 item found by the master to be due

owing the balance due of \$2564.05 were sustained; but the

by the court the exceptions to the findings of the master con-

laved to stand as exceptions. Upon the hearing of the case

were overruled by the master, and the objections were then af-

these findings of the master appellee filed objections which

tained as a part of the purchase price of the White house. To

should also be charged with \$250.00 which he had improperly re-

property amounting to the sum of \$2564.05; and that the appellee

from the proceeds of the sale of the Burdick farm and personal

he found that there was a balance due from the appellee arising

May 4, 1917, and the master thereupon made a report in which

before the master at various times between July 26, 1916, and

of the account between the parties. The proofs were taken

the evidence, and to report his conclusions concerning the state

plaintiff. The case was regularly referred to the master to hear

and the appellant, as administrator, was substituted as com-

sultant, and Burdick died, and thereupon the bill was

the farm was sold. During the hearing the bill was

This controversy on appeal therefore concerns only the matter of the balance of \$2564.05 to which the court sustained exceptions.

The proof shows that appellee took charge of the sale of the farm for Burdick in 1913, and that it was sold to Johnson on November 17th of that year for \$16870.00. The first payment of the purchase price made by Johnson to the appellee was \$500.00 but the sale was not completed until March 1, 1914, and Johnson then paid the appellee \$3370.00 in cash, turned over to him a trust deed and two notes executed by other parties and secured by a trust deed, each of the notes being for the sum of \$2000.00; and for the balance of the purchase money amounting to \$9000.00 Johnson gave his own promissory note payable ten years after date, with interest at the rate of 5% per annum, which was secured by a trust deed. And that the appellee also collected \$595.23, which was the sum total of the proceeds of the sale of Burdick's personal property, as found by the master.

The appellee denied that he was indebted to Burdick in any amount, and claimed that he had accounted for all the money and notes he had received and collected to Burdick. As evidence to show that he had done so he offered in evidence an account book which he testified was a ledger that had been kept in the regular course of his business; that it contained the Burdick accounts; that the entries in the Burdick accounts were made by him; that the entries had been made in the book about the time of each of the transactions involved; and that the entries were correct. The appellant objected to the account book offered

The controversy on appeal therefore concerns only the matter of the balance of \$2564.05 to which the court sustained the appellant's claim. The case was originally brought to the court by the appellant. The proof shows that appellee took charge of the sale of the farm for Birdick in 1913, and that it was sold to Johnson on November 15th of that year for \$1870.00. The first payment of the purchase price made by Johnson to the appellee was \$800.00 but the sale was not completed until March 1, 1914, and Johnson then paid the appellee \$3870.00 in cash, turned over to him a first deed and two notes executed by other parties and secured by a trust deed, each of the notes being for the sum of \$2000.00 and for the balance of the purchase money amounting to \$3000.00. Johnson gave his own promissory note payable ten years after date, with interest at the rate of 5% per annum, which was secured by a first deed. And that the appellee also collected \$235.25, which was the sum total of the proceeds of the sale of Birdick's personal property, as found by the master.

The appellee denied that he was indebted to Birdick in any amount, and claimed that he had accounted for all the money and notes he had received and collected to Birdick. As evidence to show that he had done so he offered in evidence an account book which he testified was a ledger that had been kept in the regular course of his business; that it contained the Birdick accounts; that the entries in the Birdick accounts were made by him; that the entries had been made in the book about the time of each of the transactions involved; and that the entries were correct. The appellant objected to the account book offered

on the ground that it was not competent evidence, and the book was admitted in evidence subject to appellant's objection; and it is certified to this court for inspection. On the question of the competency of the book as an account book it appears from appellee's own testimony that the Burdick accounts in the book were not correctly kept. It also appears from the face of the book itself on which these accounts appear that the book is not a book of account of the current business of appellee during the time of the Burdick transactions; and it is also apparent that all the entries in the Burdick accounts must have been made at the same time, and with the same pen and ink. The Burdick accounts appear to be separated from and are a thing apart from all the other matters contained in the book; nor are there any other accounts of business transactions of the appellee occurring during the period of time covered by the dates of the entries in the Burdick accounts. There are accounts which appear regularly entered on the first seventy-seven pages of the book, but all the business to which these accounts refer appears to have been transacted in the year 1889; then there is a skip in time to the year 1901, and there are some accounts and notations in pencil entered in the book as of that year. There are no more entries made in the book after 1901 until the year 1913, the first entry being under date of November 4th of that year, and this entry is in the Burdick account; and no other entries appear to have been made in the book after that except in the Burdick accounts.

It is clear from appellee's own testimony taken in connection with the entries in the book that the entries do not conform to the actual transactions had: for instance, on page 92 of the debit side of the account which relates to the

on the ground that it was not competent evidence, and the book was admitted in evidence subject to appellant's objection; and it is certified to this court for inspection. On the question of the competency of the book as an account book it appears from appellee's own testimony that the Burdick accounts in the book were not correctly kept. It also appears from the face of the book itself on which these accounts appear that the book is not a book of account of the ordinary business of appellee during the time of the Burdick transactions; and it is also apparent that all the entries in the Burdick accounts must have been made at the same time, with the same pen and ink. The Burdick accounts appear to be separated from and are a thing apart from all the other matters contained in the book; nor are there any other accounts of business transactions of the appellee occurring during the period of time covered by the dates of the entries in the Burdick accounts. There are accounts which appear regularly entered on the first seventy-seven pages of the book, but all the business to which these accounts refer appears to have been transacted in the year 1899; then there is a skip in time to the year 1901, and there are some accounts and notations in pencil entered in the book as of that year. There are no more entries made in the book after 1901 until the year 1913, the first entry being under date of November 4th of that year, and this entry is in the Burdick account; and no other entries appear to have been made in the book after that except in the Burdick accounts.

It is clear from appellee's own testimony taken in connection with the entries in the book that the entries do not conform to the actual transactions had; for instance, on page 92 of the debit side of the account which relates to the

proceeds received by him from the sale of the farm, there is a entry of cash received from O. Johnson, under date of March, of \$7370.00, (the date being written in pencil, and the balance of the entry in ink). What he received from Johnson, however, was \$3370.00 in cash, and two notes of \$2000.00 each. According to the next entry below the one referred to appellee received from Johnson ten notes amounting to the sum of \$9000.00, when as a matter of fact he received but one note for that amount. And on the \$9000.00 note referred to he collected from Johnson \$1000.00 on the 6th of October 1914, and \$2000.00 on February 15th, 1915, according to his own admissions; and he also collected \$429.17 for interest on this \$9000.00 note, but no entries appear in the book to show these collections. Then on the credit side of this account there appears an entry of a payment made by the appellee to William Wylie of \$3850.00, and it is admitted that the correct amount which he paid Wylie was only \$2500.00. Under date of April 20, 1914, he entered an item crediting himself with the amount of \$9000.00 for ten notes turned over to Burdick when the fact is evident that he did not have ten notes to turn over to Burdick at any time, but that this \$9000.00 was in one note upon which, at the time he turned it over to Burdick, \$3000.00 had been paid, and that hence this credit should have been for \$6000.00 instead of \$9000.00. There is another remarkable feature about this Burdick account, which might be mentioned in this connection. The appellee claimed on the hearing before the master that on February 27, 1914, he paid Burdick \$2000.00, but no entry appears in this account of this payment, yet strange as it may appear from the standpoint of accurate book keeping, and notwithstanding the fact that

proceeds received by him from the sale of the farm, there is
a entry of cash received from O. Johnson, under date of March
of \$770.00, (the date being written in pencil, and the balance
of the entry in ink). What he received from Johnson, however, was
\$2370.00 in cash, and two notes of \$2000.00 each. According
to the next entry below the one referred to appellee received
from Johnson ten notes amounting to the sum of \$2000.00, when as a
matter of fact he received but one note for that amount. And on the
\$2000.00 note referred to he collected from Johnson \$1000.00 on
the 6th of October 1914, and \$2000.00 on February 15th, 1915,
according to his own admissions; and he also collected \$432.14
for interest on this \$2000.00 note, but no entries appear in the
book to show these collections. Then on the credit side of
this account there appears an entry of a payment made by the
appellee to William Wylie of \$2800.00, and it is admitted that
the correct amount which he paid Wylie was only \$2800.00.
Under date of April 20, 1914, he entered an item crediting him-
self with the amount of \$2000.00 for ten notes turned over to
him when the fact is evident that he did not have ten notes
to turn over to Burdick at any time, but that this \$2000.00
was in one note upon which at the time he turned it over to
Burdick, \$2000.00 had been paid, and that hence this credit
should have been for \$2000.00 instead of \$2800.00. There is
another remarkable feature about this Burdick account, which
might be mentioned in this connection. The appellee claimed
on the hearing before the master that on February 27, 1914,
he paid Burdick \$2000.00, but no entry appears in this account
of this payment, yet strange as it may appear from the stand-
point of accurate book keeping, and notwithstanding the fact that

he did not enter this important item of \$2000.00 in the account, the total amount of the receipts on the debit side, and the total amount of the disbursements on the credit side, which include his commissions, balance exactly, and the account is closed. The conclusion is irresistible that this account was put together for the purpose of making it balance and closing it up. From what has been stated concerning this purported account book, it is apparent that it is not a regular account book in which the current business of the appellee was recorded; that it was not kept in the regular course of business, and that the items contained therein were not entered contemporaneously with the transactions to which they refer, and that it is unreliable and incorrect. A book of this character is not admissible in evidence. 1 Greenleaf on Evidence 16 Ed.p.204 par.120; Marshall v.Coleman, 187 Ill.556; Kibbe v.Bancroft, 77 Ill.18; Ruggles v.Gatton, 50 Ill. 412; Bowyer v.Sweet, 3 Scam.120; Treadway v.Treadway, 5 Ill. App.478.

The pointed comment made by the supreme court in Kibbe v.Bancroft, supra, in passing on the admissibility of an account book offered in evidence in that case, applies with equal force to the book here in question: "This book does not appear to be a book of account of current transactions, and is in no sense an account book of current business and entries, and has no place as evidence; **** an account book to be used as evidence should be the book containing an entry of transactions in a store, factory or office, as they occur in the regular order of business. It would appear from a sample of the book given in the record, that it was obsolete- had been laid aside and merely used for this entry."

he did not enter this important item of \$2800.00 in the account,
 the total amount of the receipts on the debit side, and then
 total amount of the disbursements on the credit side, which
 shows his commission, balance exactly, and the account is closed.
 The conclusion is irresistible that this account was put together
 for the purpose of making its balance and closing it up. From
 what has been stated concerning this purported account book, it
 is apparent that it is not a regular account book in which the
 current business of the appellee was recorded; that it was not
 kept in the regular course of business, and that the items con-
 tained therein were not entered contemporaneously with the trans-
 actions to which they refer, and that it is unreliable and in-
 correct. A book of this character is not admissible in evidence.
 I present on Evidence 10 Md. p. 204 par. 120; Marshall v. Coleman,
 129 Ill. 556; Kibbe v. Benoroff, 77 Ill. 18; Hughes v. Gaston,
 103 Ill. 412; Sawyer v. Sweet, 3 Dean. 120; Treadway v. Treadway,
 2 Ill. App. 478.

The pointed comment made by the supreme court in Kibbe
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 account book of current business and entries, and has no place
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 be the book containing an entry of transactions in a store,
 factory or office, as they occur in the regular order of business.
 It would appear from a sample of the book given in the record,
 that it was obsolete - had been laid aside and merely used for

The principal item in controversy, however, for which the appellee claimed credit, and to which reference has already been made, is the \$2000.00 which the appellee claims to have paid Burdick on February 27, 1914. Appellee testified that when he made this payment he took a receipt from Burdick, and that the signature on the receipt was Burdick's signature. The appellant objected to the competency of the appellee's testimony and the receipt was thereupon admitted subject to the objection. Appellee contends that no objection was made to the testimony of the ~~appx~~ appellee concerning the Burdick signature, but the record discloses that an objection was made and preserved by the appellant. Concerning the payment of the \$2000.00 the appellee testified that Burdick came into his office and wanted it, in fact demanded it, although it does not appear why he wanted it or for what purpose. It also appears from his testimony that at that time, he still had in his safe the \$2000.00 in certificates of deposit of the First National Bank of Joliet, which Johnson had paid in on the \$9000.00 note and which belonged to Burdick; that instead of turning over these certificates of deposit which belonged to Burdick he took from his safe \$2000.00 of his own money in currency consisting mostly of five and ten dollar bills, and wrapped up this bundle of currency in a newspaper and turned it over to Burdick, at the same time advising him that he had better immediately take this bundle of money to the bank across the way and deposit it; and that Burdick took the money and went right across the street to the bank and into the bank with the money; and that he saw Burdick go across the street and into the bank with the money. The records of the bank, however, do not show that any money was deposited. Burdick

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denied that he received this \$2000.00, and the appellant testified that after he was appointed conservator, and had failed to trace up this payment, he went to the office of the appellee in company with his attorney, John Savage, and Burdick, to ascertain about this payment from the appellee; and that upon this occasion when the matter was talked about between the parties, Burdick said to the appellee,—"You know you never paid me that money," whereupon Overman smiled, and replied, "You know Uncle Harrison I paid you that." But no other effort was made at that time by the appellee to satisfy the conservator who came there for the purpose of getting information of the payment of the \$2000.00; not to satisfy Burdick that it had been paid to him. Appellee did not produce the receipt which he afterwards claimed to have taken from Burdick for the \$2000.00 and which purported to have on it the signature of Burdick. It would appear most natural if he had the receipt at that time that he would have produced it to clear up the difficulty and to satisfy the conservator as well as Burdick, and to have called Burdick's attention to the signature, and to the circumstances under which he got the money, the large bundle of money which he wrapped up in a newspaper for him, and the advice which he gave him about taking it to the bank, and going to the bank with it; and it would have been most natural also for the appellee to have inquired of Burdick why he didn't deposit the money after going over to the bank with it for that purpose on his advice. It is true the appellee denies that Burdick made the statement denying that he got the money as testified to by the appellant, who is corroborated, however, by Savage; but he did not deny that the parties came to his office

denied that he received this \$2000.00, and the appellant testified that after he was appointed conservator, and had failed to make up this payment, he went to the office of the appellee in company with his attorney, John Savage, and Burdick, to ascertain about this payment from the appellee; and that upon this occasion when the latter was talked about between the parties, Burdick said to the appellee, "You know you never paid me that money," where-upon Burdick smiled, and replied, "You know Uncle Garrison I paid you that." But no other effort was made at that time by the appellee to satisfy the conservator who came there for the purpose of getting information of the payment of the \$2000.00; nor to satisfy Burdick that it had been paid to him. Appellee did not produce the receipt which he afterwards claimed to have taken from Burdick for the \$2000.00 and which purported to have on it the signature of Burdick. It would appear most natural if he had the receipt at that time that he would have produced it to clear up the difficulty and to satisfy the conservator as well as Burdick, and to have called Burdick's attention to the signature and to the circumstances under which he got the money, the large bundle of money which he wrapped up in a newspaper for him, and the advice which he gave him about taking it to the bank, and going to the bank with it; and it would have been most natural also for the appellee to have inquired of Burdick why he didn't deposit the money after going over to the bank with it for that purpose on his advice. It is true the appellee denied that Burdick made the statement denying that he got the money, as testified to by the appellant, who is corroborated, however, by Savage; but he did not deny that the parties were in his office

to see about the \$2000.00 payment; nor did he deny that all he said on that occasion concerning the matter was, "You know Uncle Harrison I paid you that." It seems unnecessary, however, to discuss the features in appellee's testimony which impeach its veracity, inasmuch as an objection was made by appellant challenging his competency as a witness in his own behalf. Sec.2, Chap.51 of the Act Concerning Evidence and Depositions in Civil Cases, provides that no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, when any adverse party sues or defends as conservator or administrator. Under this section of the statute it is apparent that the appellee was incompetent as a witness to testify concerning any of the transactions or conversations that took place between him and Burdick except the conversations or transactions brought into the case by the testimony of the appellant; nor was he a competent witness to testify concerning the purported signature of Burdick on the receipt referred to. All the testimony of the appellee, therefore, with the exception which has been pointed out, should be excluded from consideration in the final determination of this case.

Appellee made no attempt to prove the genuineness of the signature on the receipt in question by competent evidence, except that he called his brother, John W. Overman, as a witness to corroborate his own testimony concerning the payment of the \$2000.00. And the brother testified that he was in the appellee's office on the day that appellee claims he made the payment; that he came there on that day from Chicago, and returned to Chicago

to see about the \$2000.00 payment; nor did he deny that all he said on that occasion concerning the matter was, "You know Uncle Arthur I paid you that." It seems unnecessary, however, to discuss the features in appellee's testimony which impugned its veracity, inasmuch as an objection was made by appellant challenging his competency as a witness in his own behalf. Sec. 8, Chap. 91 of the Act Concerning Evidence and Testimony in Civil Cases, provides that no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, when any adverse party does or defends as conservator or administrator. Under this section of the statute it is apparent that the appellee was incompetent as a witness to testify concerning any of the transactions or conversations that took place between him and Burdick except the conversations or transactions brought into the case by the testimony of the appellee; nor was he a competent witness to testify concerning the purported signature of Burdick on the receipt referred to. All the testimony of the appellee, therefore, with the exception which has been pointed out, should be excluded from consideration in the final determination of this case.

Appellee made no attempt to prove the genuineness of the signature on the receipt in question by competent evidence, except that he called his brother, John Overman, as a witness to corroborate his own testimony concerning the payment of the \$2000.00. And the brother testified that he was in the appellee's office on the day that appellee claims he made the payment; that he came there on that day from Chicago, and returned to Chicago

in the evening, and that it was the first time he had been in Plainfield for many years. But is sufficient to say concerning the testimony of the brother that its lack of evidentiary force or value is made clearly manifest by the following answers which he gave to certain questions propounded to him on cross examination:

Q. What kind of money did you see there?

A. I didn't see the money, Mr. Downey.

Q. Where was it counted out? A. It was counted ^{out}/right on his desk.

Q. Could you see the desk?

A. I might have if I had looked. It was not anything of my business. I was not looking there to see any money.

Q. You didn't see any money at all, did you?

A. No, I couldn't see the money.

Q. You don't know whether it was two thousand dollars, or any other sum in fact, that was turned over to him, do you?

A. All I know is what he said in there.

Q. Did you see him sign the receipt?

A. No, I didn't see him sign the receipt.

Q. Did you see the receipt at all?

A. I did not.

Q. Have you seen it?

A. No, sir, I don't know anything about it.

Q. Do you know whether there was a receipt signed or not?

That is what I want to get at? A. No, sir.

Q. Do you know in fact, of your own knowledge, whether there was a receipt made out and signed by anybody?

A. I really don't know about that.

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which he gave to certain questions propounded to him at
examination:

Q. What kind of money did you see there?

A. I didn't see the money, sir.

Q. Where was it located? A. It was located in the
desk.

Q. Could you see the desk?

A. I might have if I had looked. It was not anything at all
business. I was not looking for any money.

Q. You didn't see any money at all, did you?

A. No, I didn't see the money.

Q. You don't know whether it was two thousand dollars, or
any other sum in fact, that was turned over to him, do you?

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Q. Did you see him sign the receipt?

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A. I did not.

Q. Have you seen it?

A. No, sir, I don't know anything about it.

Q. Do you know whether there was a receipt signed or not?

A. No, sir. That is what I want to get at?

Q. Do you know in fact, of your own knowledge, whether there
was a receipt or not?

A. I really don't know.

The master found that there was no competent evidence in the case to show that the appellee had accounted to Burdick for the balance of \$2564.05, and that this amount, as well as the item of \$350.00, was still due from the appellee. We are of opinion that the master's finding in that regard was correct, and that the court erred in sustaining the exceptions thereto. For the reasons hereinbefore stated that part of the decree sustaining the exceptions to the master's report is reversed, and the cause is remanded with directions to overrule the exceptions and to decree the payment by the appellee by the unaccounted for balance of \$2564.05 as found by the master, as well as the item of \$350.00.

Reversed and Remanded with directions.

... The master found that there was no competent evidence in the case to show that the appellee had accounted for the balance of \$2864.05, and that this amount, as well as the item of \$300.00, was still due from the appellee. The court opinion that the master's finding is correct and affirmed, and that the court erred in reversing the same. The court further stated that it is the duty of the appellee to account for the money in question, and that the master's decision is correct. The court affirmed the master's decision, and the appellee's motion for a new trial was denied. The court also affirmed the master's decision as to the amount of \$2864.05, and the item of \$300.00.

Testimony of the master and the appellee.

Any other evidence?

Did you see it?

No, I did not.

I did not.

Have you seen it?

No, I have not.

STATE OF ILLINOIS,
SECOND DISTRICT.

} SS.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court





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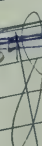
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